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NEPA'S PROGENY INHABIT THE STATES

—WERE THE GENES DEFECTIVE?†

DONALD G. HAGMAN*

This is the story of state provisions influenced by the National Environmental Policy Act of 1969 (NEPA).¹ California's Environmental Quality Act of 1970 (CEQA)² is the major vehicle for this story. CEQA was the first NEPA-like act to be adopted by a state, and probably has had more impact and been involved in more controversy than any other state act. It has been construed in several reported decisions, and in the wake of all this attention, CEQA has been amended.

Part I of this article is descriptive. First, it explains in rather great detail the story of CEQA. Second, it describes the principal statute or other document that brought NEPA-like provisions to the other states. Third, the article sets forth the cases, if any, that have construed such provisions. Part II of this article is the editorial.

I. NEPA AND NEPA-LIKE STATE LAWS

NEPA became law on January 1, 1970. A little over a month later, environmental litigants first demonstrated to a federal agency that the Act had teeth.³ In the early days, all courts were not equally im-

† With the exception of the postscript, this article is an edited version of a speech given at the annual banquet of the URBAN LAW ANNUAL on April 7, 1973, in St. Louis.

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1. 42 U.S.C. § 4321 *et seq.* (Supp. 1973).

2. CAL. PUB. RES. CODE §§ 21000-174 (West Supp. 1972), *amending* CAL. PUB. RES. CODE §§ 21000-21151 (West 1970).

3. *Texas Comm. v. United States*, 1 ERC 1303 (W.D. Tex. 1970).

pressed,⁴ but assisted by the strong interim guidelines⁵ quickly published by the Council on Environmental Quality (CEQ),⁶ environmental plaintiffs began to find NEPA a reliable workhorse. Their cases confirmed a tough stance, encouraging the CEQ to adopt rigorous final guidelines.⁷ Moreover, any doubts that NEPA was a “paper tiger” were dispelled on July 13, 1971, in *Calvert Cliffs’ Coordinating Committee, Inc. v. AEC*,⁸ a case which gave NEPA such a clarion call to significance that almost everything that has since happened to NEPA is anticlimactic.

NEPA attracted the attention of environmentalists at the state level almost immediately. Bills were introduced for NEPA-like acts in numerous states before the potency of NEPA-like legislation was clearly apparent. A February 1, 1973, survey reported:

[I]t appears that 11 states (and Puerto Rico) currently have a general state EIS [environmental impact statement] requirement similar to Section 102 of NEPA. Another seven states require EIS for certain types of projects (e.g., wastewater treatment facilities; roads and highways). General EIS requirements are under consideration in at least 18 states (and the District of Columbia).⁹

Partially because Puerto Rico adopted NEPA almost verbatim, Puerto Rico passed the first NEPA-like act.¹⁰ The Act applied to “all agencies of the government,”¹¹ just as NEPA applied to “all agencies of the Federal Government.”¹² The intent may have been to apply the Act to local governments in Puerto Rico. On the other hand, where “all agencies of the Federal Government” under NEPA were directed to “make available to States, counties, municipalities”¹³

4. *See, e.g.*, *Pennsylvania Environmental Council, Inc. v. Bartlett*, 315 F. Supp. 238 (M.D. Pa. 1970), *aff’d*, 454 F.2d 613 (3d Cir. 1971).

5. CEQ, *Statements on Proposed Federal Actions Affecting the Environment*, 35 Fed. Reg. 7390 (1970).

6. The CEQ was created by 42 U.S.C. § 4342 (1970).

7. *Statements on Proposed Federal Actions Affecting the Environment*, 36 Fed. Reg. 7724 (1971); *revised in* 38 Fed. Reg. 20550 (1973).

8. 449 F.2d 1109 (D.C. Cir. 1971).

9. T. Trzyna, Center for California Public Affairs, *Survey of State Environmental Policy Acts*, Report No. 1, Feb. 1, 1973.

10. P.R. LAWS ANN. tit. 12, §§ 1121-40 (Supp. 1973).

11. *Id.* § 1124.

12. 42 U.S.C. § 4332 (1970).

13. *Id.* § 4332 (F).

information about enhancing the environment, the Puerto Rican agencies were directed to "offer municipalities"¹⁴ such information, raising at least an inference that local governments in Puerto Rico were not required to prepare an environmental impact statement (EIS) for their own actions.

A. *CEQA—The Beginnings and Enactment*

CEQA, which became the first NEPA-like state act, was introduced in the California legislature three months after the passage of NEPA. No one could have known at the time that it was to be called to significance by *Friends of Mammoth v. Board of Supervisors*,¹⁵ the case which called nationwide attention to CEQA.

As enacted into law on September 17, 1970, however, CEQA was rather simple and uncomplicated. After a declaration of policy and findings, the Act contained two operative chapters. The first applied to all state agencies, boards and commissions and required a report from them on any "project" they proposed which could have a significant effect on the environment.¹⁶ The report was to contain a statement on matters¹⁷ substantially similar to those listed in the requirements of NEPA § 102 (2) (C) (i) - (v).¹⁸ Whenever state officials commented on any federal "projects," the same statement on matters was to be included.¹⁹ No state division could fund or request funds unless the statement was provided.²⁰ A "project" involving only planning was expressly excepted. The State Office of Planning and Re-

14. P.R. LAWS ANN. tit. 12 § 1124 (F) (Supp. 1973).

15. 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972). See note 115 and accompanying text *infra*.

16. CAL. PUB. RES. CODE § 21100 (West 1970).

17. *Id.* The statement on matters includes:

- (a) The environmental impact of the proposed action.
- (b) Any adverse environmental effects which cannot be avoided if the proposal is implemented.
- (c) Mitigation measures proposed to minimize the impact.
[This section not found in NEPA § 102(2)(C)(i)-(v).]
- (d) Alternatives to the proposed action.
- (e) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity.
- (f) Any irreversible environmental changes which would be involved in the proposed action should it be implemented.

18. 42 U.S.C. § 4332 (2) (C) (i)-(v) (1970).

19. CAL. PUB. RES. CODE § 21101 (West 1970).

20. *Id.* § 21102.

search was directed to work with state, regional and local agencies to develop implementing provisions.²¹ As with § 102 (2) (C) of NEPA, the preparing body was to consult with other knowledgeable state agencies before making the statement.²² The “environmental impact report” (EIR)²³ and the comments from other governmental agencies were to be a part of the regular “project” report used in the existing review and budgetary process and be available to the legislature and the general public.²⁴ State divisions were directed to include in budget requests funds sufficient to protect the environment from problems created by their “activities”²⁵ and to let the Governor and legislature know of any deficiencies in their present authority which would hinder compliance with CEQA.²⁶

The second operative chapter provided that state divisions allocating “state or federal funds on a *project-by-project* basis to local agencies for . . . projects . . . shall,” unless exempted by the implementing guidelines, require an EIR from the local agency before disbursing funds, except funds for planning purposes.²⁷

But that provision was a direction to state agencies as well as local agencies. What of strictly local projects? CEQA provided:

The legislative bodies of all cities and counties which have an officially adopted conservation element of a general plan shall make a finding that any project they intend to carry out, which may have a significant effect on the environment is in accord with the conservation element of the general plan. All other local governmental agencies shall make an environmental impact report on any project they intend to carry out which may have a significant effect on the environment and shall submit it to the appropriate local planning agency as part of the report required by Section 65402 of the Government Code.²⁸

The second sentence of the section was a bit enigmatic. Did the “all other local governmental agencies” mean cities and counties

21. *Id.* § 21103.

22. *Id.* § 21104.

23. In California, the document known as an environmental impact statement (EIS) under NEPA is called an environmental impact report (EIR).

24. CAL. PUB. RES. CODE § 21105 (West 1970).

25. *Id.* § 21106. NEPA § 102(2) (C) uses the term “actions.”

26. *Id.* § 21107. This section was repealed by CAL. PUB. RES. CODE § 21107 (West Supp. 1972).

27. CAL. PUB. RES. CODE § 21150 (West 1970) (emphasis added).

28. *Id.* § 21151.

which had no conservation element? Or did it mean all types of local agencies, such as school and special districts?

The reference to Section 65402 of the Government Code helped. That section is a provision similar to that found in many state planning enabling laws, including A Standard City Planning Enabling Act,²⁹ whereby a planning commission is given power to review acquisitions, disposals, vacations, abandonments, and construction by public agencies. In California, the statute has three subsections. The first applies to cities or counties. If a city or county acts, it must first refer the matter to the local planning agency for review. The second subsection has similar provisions for when the county acts within a city or a city acts within a county—the planning agency of the government controlling the territory must review. The third subsection requires “a local agency,” which by definition excludes the state, a county, or a city, to submit its actions to the planning agency of the city or county in which the action is to occur. All of these requirements apply only if the city or county has a general or partial plan.

It made some sense to construe CEQA’s “all other local governmental agencies” to mean special and school districts but not cities and counties because that is how Section 65402 used the term “local agency.” Moreover, because of legislation passed a month before CEQA, all cities and counties would have conservation elements in their general plans by July 1, 1972.³⁰ The ambiguity probably delayed city and county attentiveness to the demands of CEQA. At the time, the state’s deadline for planmaking seemed more threatening.

B. NEPA Influences Other States

In March and April of 1971, three states adopted NEPA-like acts. Montana³¹ adopted NEPA almost verbatim. Like Puerto Rico, Montana’s Act contained the ambiguity³² over the Act’s application to local government.³³

29. § 9, U.S. Dept. of Commerce (rev. ed. 1926).

30. Ch. 717, § 3, [1970] Cal. Stats. 1345 (approved and filed Aug. 13, 1970) required cities and counties to have conservation elements of general plans by July 1, 1972. The date has subsequently been changed to Dec. 31, 1973.

31. Montana Environmental Policy Act, MONT. REV. CODES ANN. §§ 69-6501 to 69-6517 (Supp. 1973).

32. See notes 11-14 and accompanying text *supra*.

33. Compare MONT. REV. CODES ANN. § 69-6504(b) with § 69-6504(b)(6) (Supp. 1973). Indiana has an identical provision; see note 77 *infra*.

New Mexico³⁴ adopted a law which rearranged some of NEPA's sections and left other matters out. But with some deletions, the heart of the Act was that of NEPA § 102. Since the New Mexico Act did not contain a provision instructing state agencies to give advice to local governments, it is not clear whether the duties imposed in New Mexico on "all agencies of the state"³⁵ included local governments.

Washington³⁶ adopted a statute which, while influenced by NEPA, is different from other state statutes. The statute applies only to state highways which the Department of Highways determines will significantly affect the quality of the human environment and to all highways in new locations or requiring additional right of way. An EIS is to be prepared on such projects prior to the first public hearing relating to location or design. The report is to include matters similar to those required by NEPA.³⁷

Once the highway department finishes its report, it is sent to the director of the Department of Ecology, who determines whether the project will have a significant environmental impact. If *he* concludes it will, *he* prepares an "environmental review statement" which includes "a statement of any beneficial environmental impact or any amenities either natural or human which may reasonably be expected to occur as a result of the project." Prior to the Department of Highway's public hearing, the environmental review statement is sent to the Department, to interested persons, and to the press.³⁸

Two features of the Washington statute therefore commend themselves for attention to other states. First, as with the California statute, which requires that an EIR be sent to a planning agency for review,³⁹ the Washington EIS is sent to an ecology agency that has broad responsibilities for "watchdogging" the environment. The development agency is not its own judge. Indeed, the Washington statute even goes further than the California statute and requires a broader-view agency to determine significance and to prepare the report. Secondly, while NEPA and most NEPA-like state acts create

34. N.M. STAT. ANN. §§ 12-20-1 to 12-20-7 (Supp. 1973).

35. *Id.* § 12-20-6.

36. WASH. REV. CODE ANN. §§ 47.04.110-47.04.130 (Supp. 1972).

37. *Id.* § 47.04.120.

38. *Id.* § 47.04.130.

39. *See* note 28 and accompanying text *supra*.

the impression that the natural environment is good and that development is an evil to be tolerated only when necessary, the Washington statute seems to suggest that a highway could itself benefit the natural or human environment.

Then in May of 1971, Washington adopted a virtually verbatim NEPA-like statute⁴⁰ that expressly resolved the local government enigma. Under the Washington statute, NEPA-like duties were imposed on "all branches of government of this state, including state agencies, municipal and public corporations, and counties."⁴¹ In strict loyalty to NEPA language, the Washington statute included all "actions,"⁴² and thus is arguably broader than the California law which refers to state and local "projects."⁴³

In June, rather than apply NEPA-like legislation to all actions or to particular actions within the state, Delaware adopted legislation applying to some actions within a limited part of the state—the coastal zone.⁴⁴ Requests for manufacturing permits must be referred to the State Planning Office and must be accompanied by an EIS.⁴⁵

Instead of passing legislation, Hawaii applied a NEPA-like requirement by executive order of the Governor. The order applied to proposals for legislation and to any other major state actions or projects utilizing state funds and/or state lands, and generally followed NEPA § 102.⁴⁶

Even a casual reading of the North Carolina Act,⁴⁷ with an October 1971 effective date, indicates it was drafted with both NEPA and CEQA as models. Like the California Act, the matters covered in the North Carolina EIS include six, rather than NEPA's five,⁴⁸ items. The sixth item from CEQA includes "mitigation measures proposed

40. WASH. REV. CODE ANN. §§ 43.21C.010-43.21C.900 (Supp. 1972).

41. *Id.* § 43.21C.030(2).

42. *Id.* § 43.21C.030(2)(c).

43. *See* notes 16-28 and accompanying text *supra*. As will be made clear in the discussion of the *Friends of Mammoth* case the California law was interpreted as if it said "actions."

44. DEL. CODE ANN. tit. 7, §§ 7001-7013 (Supp. 1972).

45. *Id.* §§ 7004, 7005.

46. Exec. Order, April 23, 1971 (Hawaii), 2 102 MONITOR 21 (Council on Environmental Quality, May 1972).

47. N.C. GEN. STAT. §§ 113A-1 to 113A-10 (Supp. 1971).

48. *See* note 17 *supra*.

to minimize the impact.”⁴⁹ State-*permitted* projects are not generally included; rather, the North Carolina Act requires a statement by state agencies only “for legislation and actions involving expenditure of public moneys for projects and programs.”⁵⁰

Local agencies in North Carolina are not required to prepare environmental impact statements for their own activities, but cities, counties and towns are authorized to require any special-purpose governmental unit or private developer of a major development project to furnish a statement.⁵¹ “Major developments” include shopping centers, subdivisions and other housing developments, and industrial and commercial projects, but exclude any project of less than two contiguous acres in extent.⁵² A local government is to provide information to a state agency which may be required to prepare an EIS where programs, projects, and actions of local governmental units are subject to review, approval, or licensing by state agencies.⁵³

C. CEQA—*The Controversy Begins to Ripen*

During the last half of 1971, the stage was being set in California for the showdown over CEQA in the coming year. In June, the Board of Supervisors of Mono County affirmed the decision of its planning commission to issue a conditional use permit for a small condominium, and a building permit was subsequently issued. Lower courts refused to intervene, and the Supreme Court of California was asked to issue a stay since the developer in Mono County then had all the permission needed to begin development.⁵⁴

During the last half of 1971, California state, regional, and local agencies were also working on interim administrative procedures for implementing CEQA with less than deliberate speed. The California Resources Agency promulgated some interim guidelines⁵⁵ that exer-

49. N.C. GEN. STAT. § 113A-4(2)(c) (Supp. 1971).

50. *Id.* § 113A-4(2).

51. *Id.* § 113A-8.

52. *Id.* § 113A-9(1).

53. *Id.* § 113A-9(3).

54. The facts in this paragraph are from the petition for the stay in *Friends of Mammoth v. Board of Supervisors*, filed in the Supreme Court of the State of California, Oct. 28, 1971.

55. Proposed Guidelines for the Preparation and Evaluation of Environmental Impact Statements Under the California Environmental Quality Act of 1970 (1971).

cised Evelle J. Younger, the California attorney general, who had a strong environmental unit. Younger and some of his deputies, in a formal petition addressed to no one in particular⁵⁶ and filed by "attorneys for and on behalf of the People of the State of California,"⁵⁷ picked up a word from *Calvert Cliffs*⁵⁸ and alleged that the proposed guidelines were a "crabbed"⁵⁹ interpretation of the CEQA requirements.

The attorney general complained that the proposed guidelines did not cover local agencies⁶⁰ and that the policy statement in the guidelines indicated that environmental quality should be restored only "to the fullest extent practicable."⁶¹ The attorney general pointed out that the statute contained no such limitation⁶² and also alleged that the guidelines read as if the long-term "protection of the environment" was a "guiding criterion." The attorney general said that "protection of the environment" was *the* "guiding criterion."⁶³

CEQA did not define the term "project."⁶⁴ The proposed guidelines stated, "'Project' includes any major work segment involving siting, land purchases, design, or construction activities, utilizing state or federal funds carried out by any or all levels of government, which could have a significant effect on the environment of the state."⁶⁵ Pointing out that no statutory support existed for use of the adjective "major" in CEQA, as distinguished from NEPA, and arguing that the term "project" was equivalent to the term "actions" used in the CEQ Interim Guidelines,⁶⁶ the attorney general proposed his own definition of project:

56. Attorney General of the State of California, Petition, "*In re* Proposed Guidelines for the Preparation and Evaluation of Environmental Impact Statements Under the California Environmental Quality Act of 1970," Sept. 3, 1971 [hereinafter cited as Attorney General Petition].

57. Attorney General Petition 1.

58. See note 8 and accompanying text *supra*.

59. Attorney General Petition 3. "We believe that the Commission's crabbed interpretation of NEPA makes a mockery of the Act." *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1117 (D.C. Cir. 1971).

60. Attorney General Petition 3.

61. *Id.* at 6.

62. *Id.* at 7.

63. *Id.* at 8.

64. Consider the description of CEQA with emphasis on use of term "project" in notes 16-28 and accompanying text *supra*.

65. Attorney General Petition 9.

66. CEQ, Statements on Proposed Federal Actions Affecting the Environment, para. 5(a) (ii), 35 Fed. Reg. 7390 (1970).

Project includes activities:

- (a) Directly undertaken by state or local governmental agencies;
- (b) Supported in whole or in part through state or local public agency contracts, grants, subsidies, loans or other forms of funding assistance;
- (c) Involving a state or local governmental agency lease, permit, license, certificate or other entitlement for use.⁶⁷

The attorney general also complained that the Resource Agency's proposed guidelines included "utilitarian" as well as "environmental" goals without statutory warrant,⁶⁸ that the guidelines were not loyal to NEPA interpretations on retroactivity,⁶⁹ and that the guidelines exempted "routine" projects without statutory warrant.⁷⁰ The attorney general noted that environmentally-oriented state departments, such as those dealing with fish and game, would likely be overwhelmed by having to make comments on statements of larger, well-funded departments dealing with public works and water resources. He suggested that the guidelines enable the commenting agencies to bill the development agencies and that the cost could then be passed on to the projects, forcing them to absorb the environmental costs imposed.⁷¹ To facilitate public input, the attorney general suggested the guidelines should also contain provisions for a draft EIR which would be published in a monthly publication to be circulated to interested parties and upon which the public would have 90 days to comment.⁷²

The order of the Supreme Court of California agreeing to hear the Mono County case and issuing a stay was the opening event in the NEPA-like story in 1972.⁷³ On February 2, 1972, a bill⁷⁴ was intro-

67. Attorney General Petition 9. The attorney general thus concluded that state and federal requirements were identical, except that "'Projects' does not include recommendations or reports relating to legislation and appropriations and does not include policy and procedure making." *Id.* at 20.

68. *Id.* at 20.

69. *Id.* at 21-22.

70. *Id.* at 22-23.

71. *Id.* at 26.

72. *Id.* at 29-30. In so suggesting, the attorney general indicated that these recommended procedures were based on the 1971 CEQ guidelines (*see* note 7 *supra*) and on that agency's "102 Monitor" publication, which contains information on EIS's that are being prepared by agencies.

73. The order taking jurisdiction was entered on Jan. 13, 1972. Brief for Appellants at 3, *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972).

74. Cal. A.B. 304, § 21151 (1972).

duced in the legislature to require an EIS of all local governments for projects they permitted. This bill gave some support to the argument of local governments that CEQA had not previously included publicly-permitted private projects.

D. *NEPA Influences More States, CEQA Controversy Ripens, State Courts Begin to React*

The California controversy may have come to the attention of Indiana legislators, for the Indiana Act,⁷⁵ while virtually verbatim NEPA, does provide that an EIS is not required "for the issuance of a license or permit by any agency of the state."⁷⁶ But the application of the Act to local agency projects was not clear, for, as with several other states, the Act inscrutably applies to "all agencies of the state."⁷⁷ The Indiana statute also usefully provides that "[a]ny state agency that is required by the national environmental policy act to file a federal environmental impact statement shall not be required to file a statement with the state government . . . unless the action contemplated requires state legislation or state appropriations."⁷⁸

In March, a bill⁷⁹ which was ultimately to amend CEQA was introduced in the California legislature by the principal author of the original bill. But in April, the newsmaking on NEPA-like state acts shifted to Wisconsin, which adopted a NEPA-like act.⁸⁰ The Wisconsin Act applied to "all agencies of the state,"⁸¹ thus leaving local governments in limbo, but adopted the Council on Environmental Quality guidelines as the Wisconsin guidelines.⁸² Thus, publicly-permitted private projects were assumedly included. Another provision was similar to a provision in the Washington Act⁸³ dealing

75. IND. ANN. STAT. §§ 35-5301 to 35-5308 (Supp. 1973).

76. *Id.* § 35-5306.

77. *Id.* § 35-5303(2). As with other state statutes, the Indiana statute might suggest local agencies are excluded because IND. ANN. STAT. § 35-5303(2)(C)(f) (Supp. 1973), indicates that state agencies shall "make available to counties, municipalities, institutions, and individuals, advice . . ." The language is essentially identical to MONT. REV. CODES ANN. § 69-6504(b)(6) (Supp. 1973). *See* note 33 *supra*.

78. IND. ANN. STAT. § 35-5308 (Supp. 1973).

79. Cal. A.B. 889 (1972).

80. WIS. STAT. ANN. § 1.11 (Supp. 1973).

81. *Id.* § 1.11(2).

82. *Id.* § 1.11(2)(c).

83. *See* notes 38-39 and accompanying text *supra*.

with highways: the EIS "shall also contain details of the beneficial aspects of the proposed project, both short term and long term, and the economic advantages of the proposal."⁸⁴ A Wisconsin provision not found in NEPA and unique to the state statutes thus far considered was that "every proposal other than for legislation shall receive a public hearing before a final decision is made;" if a hearing was otherwise required, the EIS hearing requirement was satisfied.⁸⁵ Effective April 29, 1972, Wisconsin also provided that its Department of Natural Resources could require an environmental impact statement of an applicant for any permit or Department approval if the area affected exceeded 40 acres or the estimated cost of the project exceeded \$25,000.⁸⁶

In *Civic Improvement Committee v. Volpe*,⁸⁷ the first case to cite a state NEPA-like statute, the Fourth Circuit, with one dissent, held that a highway project had too little federal involvement to warrant an injunction for failure to prepare an EIS under NEPA. But the court noted that plaintiffs might wish to pursue their remedy under the NEPA-like North Carolina statute.

Plaintiffs' first reported judicial success under a state NEPA-like law occurred in July of 1972. In *Keith v. Volpe*,⁸⁸ plaintiffs sought to enjoin the Federal Highway Administration, under NEPA, and the California Division of Highways, under CEQA, from continuing a freeway project until an EIS and an EIR were provided. The primary issue in the case was whether or not the project was so far along at the time of the effective date of the statutes as to excuse the highway funding and building agencies from preparing the statement and the report. The issue has become a familiar one under NEPA, and the federal court, as have many others applying NEPA, held that the project was not so far along, even on September 18, 1970, the effective date of CEQA, so as to excuse preparation of an EIS and an

84. WIS. STAT. ANN. § 1.11(2)(c)(6) (Supp. 1973).

85. *Id.* § 1.11(2)(d). Of course, some *guidelines* require or encourage public hearings. See, e.g., CEQ, Statements on Proposed Federal Actions Affecting the Environment, para. 10(e), 36 Fed. Reg. 7724, 7726 (1971); CEQA Guidelines, provision discussed at note 232 and accompanying text *infra*. Massachusetts has a statutory public hearing requirement; see note 92 and accompanying text *infra*.

86. WIS. STAT. ANN. § 1.11 (Supp. 1973).

87. 459 F.2d 957 (4th Cir. 1972).

88. 352 F. Supp. 1324 (C.D. Cal. 1972). In a rehearing the court basically reaffirmed its prior opinion, 4 ERC 1562 (1972).

NEPA EFFECTS

EIR. The court noted the similarity between NEPA and CEQA and held that they should be interpreted in the same manner on the retroactivity issue. The opinion constituted notice that, absent an express difference in language, NEPA-like state acts would find cases under NEPA being used as precedent. Later in July, a federal district court, in *Northside Tenants' Rights Coalition v. Volpe*,⁸⁹ cited Wis. Stat. Ann. § 1.11 (2).⁹⁰ The case involved a challenge to a freeway, and a preliminary injunction was issued on the basis of NEPA, the court finding it unnecessary to consider the Wisconsin statute.

Also in July, Massachusetts enacted a law requiring that "all agencies, departments, boards, commissions and authorities of the commonwealth shall review, evaluate, and determine the impact on the natural environment of all works, projects or activities conducted by them. . . ."⁹¹ The statute further directed that no commonwealth agency "or any authority of any political subdivision thereof shall commence any work, project, or activity which may cause damage to the environment until sixty days after it has published a final environmental impact report . . . or until sixty days after a public hearing on said report"⁹² Research, planning, design, and other preliminary work, however, could be undertaken. The statute would seem to cover local agencies and might be intended to cover publicly-permitted private activities. The report was to be disseminated to "the originating agency, reviewing agencies, the appropriate regional planning commission, the attorney general and the public."⁹³ The express mention of the attorney general was an interesting feature. Among the California attorney general's complaints about the preliminary California guidelines was that the Resources Agency had not listed the attorney general as one to be consulted for comments.⁹⁴ The attorney general pointed out that he had jurisdiction to bring any action necessary to enforce any law, including CEQA.

In a feature likely motivated by reasons similar to those requiring that reports on highways in Washington must be sent to the Director of the Department of Ecology,⁹⁵ the Massachusetts statute provided

89. 346 F. Supp. 244 (E.D. Wis. 1972).

90. See note 80 and accompanying text *supra*.

91. MASS. GEN. LAWS ANN. ch. 30, § 61 (1973).

92. *Id.* § 62.

93. *Id.*

94. Attorney General Petition 27.

95. See note 38 and accompanying text *supra*.

that the Secretary of Environmental Affairs must approve the selection of any consultant engaged to prepare the draft or final impact report. Perhaps by the time the Massachusetts statute had passed, notice had been taken of the explosion of EIS consulting firms in California. Another Massachusetts provision was more like Washington's statute: "the secretary of environmental affairs . . . shall issue a written statement indicating whether . . . reports adequately and properly comply with the provisions of this section."⁹⁶ As with the Wisconsin law, the Massachusetts Act used NEPA as a model⁹⁷ to guide state departments in promulgating their own rules and regulations to carry out the purpose of the Massachusetts Act.⁹⁸

These provisions give the impression that the Massachusetts law was drafted with the experience of other states before the draftsmen. So it is not surprising that the Massachusetts statute, the last *statute* known to have been enacted as this article is being written,⁹⁹ looks considerably different from NEPA. As final evidence of the borrowing from other states, one might note that the suggestion by the California attorney general¹⁰⁰ that development agencies be authorized to pay environmental agencies for expenses incurred in evaluating the EIR is a feature of the Massachusetts law.¹⁰¹

The North Carolina Act, based on a state tradition that gives its legislature one of the best research backups of any state in the country, had ordered the Governor to report to the Legislative Research Commission on or before August 1, 1972, concerning the experience under the Act and his recommendations.¹⁰² The Governor complied and made several recommendations.¹⁰³

96. MASS. GEN. LAWS ANN. ch. 30, § 62. Does such a provision mean less judicial review? See note 112 and accompanying text *infra*.

97. As indicated at note 82 and accompanying text *supra*, Wisconsin actually uses the Council on Environmental Quality guidelines as a referent.

98. MASS. GEN. LAWS ANN. ch. 30, § 62 (1973).

99. See Connecticut Executive Order at note 138 and accompanying text *infra*. See also the article's postscript for recent statutes.

100. See note 71 and accompanying text *supra*.

101. MASS. GEN. LAWS ANN. ch. 30 § 62 (1973).

102. N.C. LAWS ch. 1203, § 11 (1971). N.C. GEN. STAT. § 113A-1 (Supp. 1971).

103. Governor Robert W. Scott, A Report to the Legislative Research Commission on Experience with the Environmental Policy Act of 1971, with Recommendations for Refinement (July 1972) [hereinafter cited as Gov. Scott Report]. These recommendations are now before the North Carolina Legislature, Letter from Roy Paul, N.C. Office of State Planning, to Donald Hagman, March 20, 1973.

NEPA EFFECTS

He recommended that EIS's on proposed legislation be dropped, noting that a similar provision in NEPA had been implemented only superficially and that with over 2,000 bills introduced yearly in the North Carolina legislature, the provision was hardly workable. But, the Governor noted, the agencies and lawmakers should consider environmental matters in making legislative proposals.¹⁰⁴ He also recommended that the EIS be prepared early in the planning process. Noting that alternatives have usually been superficially stated and their environmental impacts had not been clearly stated, he recommended that legislation tightening this requirement be enacted.¹⁰⁵ Citizen inputs should be sought early in the project rather than at a late date; otherwise, citizen participation would more likely become citizen opposition.¹⁰⁶

In contrast to the "crabbed" interpretation of NEPA by federal regulatory agencies concerning the need to prepare an EIS,¹⁰⁷ the Governor observed that it is the programs with regulatory powers that have the most significant impact upon the environment. But rather than require an EIS for each permit or license, the Governor recommended that "programs [of regulatory agencies] should include in their annual work programs a program plan which serves as an environmental impact analysis or guide explaining how decisions affecting the environment will be made."¹⁰⁸ He also concluded that the North Carolina Act should provide for the issuance of supplementary guidelines and should be made permanent.¹⁰⁹ Noting that only one city had utilized its authority to require EIS's as of the time of the report, the Governor recommended no changes until more experience had been accumulated.¹¹⁰

On August 16, 1972, CEQA was amended to make it clear that the "all other local governmental agencies" which were required to pre-

104. Gov. Scott Report 2, 8.

105. *Id.*

106. *Id.* at 2.

107. See note 59 and accompanying text *supra* and notes 225-31 and accompanying text *infra*.

108. Gov. Scott Report 2.

109. The original North Carolina Act has a provision for its termination on Sept. 1, 1973. N.C. GEN. STAT. § 113A-1 (Supp. 1971).

110. Gov. Scott Report 10.

pare EIR's included special districts as well as cities and counties without conservation elements.¹¹¹

*Environmental Defense Fund, Inc. v. Coastside County Water District*¹¹² was the first reported case in a state court under a NEPA-like state act. The case was important because it evidenced that state as well as federal courts might interpret NEPA-like state acts in a tough manner. The trial court had enjoined a water supply project until the water district prepared an EIR to submit to the planning commission as required by CEQA.¹¹³ The district furnished an EIR eight days later. The planning commission concluded that it was "acceptable" under CEQA and the trial court dissolved the injunction, reasoning that it was not the duty of the courts to consider the adequacy or thoroughness of the EIR.

While federal courts had ruled that a court could review the adequacy or thoroughness of an EIS, defendants on appeal argued that CEQA and NEPA were different. Under CEQA, the special district sent its EIR to a planning commission which reviewed the EIR for adequacy.¹¹⁴ The California appellate court did not accept this argument, noting that the planning commission could only receive and consider the report and make recommendations. It could not make a decision that bound the district. Therefore, the planning commission had no effective review of EIR adequacy; that duty remained in the courts. But citing federal cases, the appellate court concluded that it did not have the duty of passing on the validity of the conclusions expressed in the EIR but only on the sufficiency of the report as an informative document. The court ordered the water district to prepare a new EIR, discussing bona fide objections to its project and reporting on the project's environmental impact as an integrated whole.

E. *Friends of Mammoth*

National news was made on September 21, 1972, when the Supreme Court of California decided *Friends of Mammoth v. Board of Super-*

111. CAL. PUB. RES. CODE § 21062 (West Supp. 1972). See note 155 *infra*. For the ambiguity concerning local agencies see also notes 28-30 and accompanying text *supra*.

112. 27 Cal. App. 3d 695, 104 Cal. Rptr. 197 (1972).

113. CAL. PUB. RES. CODE § 21151 (West 1970). See note 28 and accompanying text *supra*.

114. *Id.* Compare the Massachusetts provision discussed in text at note 96 *supra*.

visors.¹¹⁵ An attorney for the Center for Law in the Public Interest, which became an amicus in *Friends*, stated:

The Court's decision to hear . . . *Friends* struck the environmental law world like a thunderbolt. The case clearly did not represent the best kind of test case On a relative scale, the project involved could only be described as quite small [a 184-unit condominium] . . . the condominium in question was to be erected directly across the street from an even larger condominium. The amount of public expenditures . . . was . . . tiny. And, since the governmental permit was issued by a local, rather than a state, body, the case was more difficult because of various quirks in the wording of the statute.

But the high court's dramatic action of reaching down to assume jurisdiction . . . hinted that the Court was anxious to hear the matter

We decided . . . to enter . . . hoping at best to get a strong favorable ruling, and at worst to minimize any unfortunate dicta that might result from the Court's considering one of the hardest, rather than the easiest, cases under the EQA first.¹¹⁶

Of course, the California attorney general had always believed that publicly-permitted private projects were covered by CEQA, and it was not surprising that the attorney general's unit charged with protecting the environment joined plaintiffs as amicus.

The principal legal question posed by the court was whether CEQA applies to private activities for which a permit or other similar entitlement is required. Since defendant Mono County did not have a conservation element of a general plan, the court indicated that the determination turned on whether the term "project" as used in § 21151¹¹⁷ included private activity for which a government permit was necessary. Since the word "project" was not defined in the Act, the court searched for some intent. In West's CAL. PUB. RES. CODE ANN. § 21000 (g), the court found the following language:

It is the intent of the Legislature that all agencies of the state government which *regulate* activities of private individuals, corporations, and public agencies which are found to affect the

115. 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972).

116. Address by Carlyle W. Hall, Jr., of the Center for Law in the Public Interest to the Victor Gruen Foundation for Environmental Planning Symposium: The Environmental Impact Statement and What It Means to You, Dec. 1, 1972.

117. See note 28 and accompanying text *supra*.

quality of the environment, shall *regulate* such activities so that major consideration is given to preventing environmental damage.¹¹⁸

The court also had before it a declaration of Assemblyman John Knox, the author of the Bill, that he intended to cover publicly-permitted private projects. On the other hand, defendants had secured Assemblyman Porter's declaration that such permits were not covered. Porter was also an author of CEQA. The consultant¹¹⁹ to the assembly committee which had developed CEQA had testified before a U.S. Senate Committee that publicly-permitted private activities were not covered by CEQA.¹²⁰ The legislative counsel¹²¹ and the state agency charged with drafting guidelines concluded that CEQA did not cover such activities.

Faced with this evidence of intent, the court opined on the weakness of the evidence, declared itself as believing the legislature was serious about improving the environment, and held that the term "project" included publicly-permitted private projects. So the holding was dictum on *state*-permitted private projects.¹²²

But did CEQA apply to *locally*-permitted private projects, which was the dispute in the *Friends* case? While the court did not mention it, there might have been some difficulty in stretching the policy statement of § 21000 (g) to cover local governments because § 21000 (g) refers to "all agencies of the state government."¹²³ But defendants thought they had a better argument. Section 21151 of the Act, the section crucial to the decision, provided that CEQA applies to a "'project' . . . 'they [*i.e.*, local governmental agencies] intend to carry out.'"¹²⁴

The court first noted that intent can sometimes prevail over the letter of an act. The court next noted the similarity of CEQA to NEPA and that the legislature must have known of the guidelines

118. 8 Cal. 3d at 256, 502 P.2d at 1054, 104 Cal. Rptr. at 766 (emphasis added by the court).

119. In the California legislature, a "consultant" is the title for the head of the staff of a committee.

120. 8 Cal. 3d at 258, 502 P.2d at 1056, 104 Cal. Rptr. at 768.

121. The legislative counsel is the attorney for the California legislature, giving opinions to the legislators and drafting bills.

122. 8 Cal. 3d at 258, 502 P.2d at 1056, 104 Cal. Rptr. at 768.

123. See note 118 and accompanying text *supra*. For a discussion of the ambiguity of other state statutes, see notes 14, 33, 35, 37 and accompanying text *supra*.

124. 8 Cal. 3d at 259, 502 P.2d at 1056, 104 Cal. Rptr. at 768.

issued under NEPA four months before passage of CEQA. The guidelines included actions, such as projects, involving a federal lease, permit, license, certificate or other entitlement for use. The court thus concluded that defendant county should have considered whether the condominium project may have a significant effect on the environment and, if so, should have prepared an EIR before issuing a conditional use or building permit.

[T]he granting or denying of a permit is an act which a governmental authority "carries out." Accordingly, we construe the phrase following "project" to mean only that before an environmental impact report becomes required the government must have some minimal link with the activity, either by direct proprietary interest or by permitting, regulating, or funding private activity.¹²⁵

To bolster its conclusion, the court rejected an argument that the traditional conditional use permit process under zoning took into account environmental impacts. The court did not believe the traditional system, at least as applied in this case, evidenced an inquiry into environmental impacts nearly as rigorous as required by CEQA. Moreover, the court indicated that to exempt private activities would lead to ruination of the environment, especially in sparsely populated Mono County where there was little in the way of public works. Additionally, Mono County had significant amounts of natural resources and wildlife in need of protection. In making these policy determinations, the court observed that to leave out publicly-permitted private projects would be incongruous and paradoxical.

Defendants sought to persuade the court that amendments to CEQA from its first introduction as a bill, when it covered "programs," to its final version covering "projects,"¹²⁶ was a narrowing of intent. But the court read the change as evidencing an intent by the legislature to leave out matters of general planning, policy, and procedure making. The court believed the statute picked up the term "project" because that term was used in the federal guidelines.

Defendants next argued that since CEQA directed that the EIR accompany the public projects report required to be delivered to a planning agency by California Government Code § 65402,¹²⁷ CEQA

125. *Id.* at 262, 502 P.2d at 1059, 104 Cal. Rptr. at 771.

126. *See* note 16 and accompanying text *supra*.

127. *See* note 29 and accompanying text *supra*.

was limited to public works projects and did not cover publicly-permitted private projects. The court concluded that CEQA's purpose cannot be frustrated by procedural details surrounding the filing of reports. If public works projects are involved, § 65402 reports and an EIR must be delivered to the planning agency; if publicly-permitted private projects are involved, the planning agency must still receive the EIR.

The court indicated in footnote 10 that it was not holding that an EIR was actually required in the *Friends* case because the privately-permitted project might have no significant effect on the environment. But the footnote continued:

[T]he term "significant effect" may not be used lightly as a basis on which to excuse the making of impact reports. Instead, the term must be interpreted broadly to include those activities which have *any nontrivial effect* on the environment. It seems clear that the project herein involved will indeed have such effect [U]nder the act a governmental entity is only required to find that the project *may* have a significant effect¹²⁸

F. *Reactions to Friends, Another State Act, Environmentalists Win Other Major Suits*

Two years and four days after its passage, CEQA had teeth. Neutral¹²⁹ observers described the *Friends* decision as "ridiculous"¹³⁰ and as the worst misconstruction of language by the Supreme Court of California since 1967,¹³¹ thereby tending to agree with the dissenting opinion which indicated that the majority had distorted the plain meaning of common English words.

The reaction of local government officials was virtually one of despair, particularly since few local governments had even implemented

128. 8 Cal. 3d 1, —, 500 P.2d 1360, 1376, 104 Cal. Rptr. 16, 32 (1972) (first emphasis added, second emphasis by court). Footnote 10 was deleted in the court's final opinion. See note 151 and accompanying text *infra*.

129. That is, those who are neither "gung-ho" environmentalists nor strong apologists for the local governments.

130. Interview with E. Rabin, Professor of Law, University of California at Davis, a specialist on land use controls.

131. Conversation with Kenneth Ehrman, attorney at law, author (with S. Flavin) of *TAKING CALIFORNIA PROPERTY* (1967). "What do you think of the *Friends* decision?" Ehrman: "It reminds me of *Sacramento County v. Hickman*." [66 Cal. 2d 841, 428 P.2d 593, 59 Cal. Rptr. 609 (1967), in which the court held that the constitutional term "full cash value" in property tax assessment could mean 25% of full cash value].

CEQA as to their own public works projects by the date of the decision. The City of Los Angeles held up issuance of permits for projects costing more than \$1 million, and grading permits were frozen for five or more lot subdivisions. Los Angeles County held up permits for construction of all kinds.¹³²

Richard Carpenter, Executive Director of the League of California Cities, said, "I can't think of any other decision that will have a more far-reaching effect on the operation of cities" ¹³³ Pointing out that 45,000 building permits were issued in Los Angeles last year, Carpenter said it would be "physically impossible" for most cities to process the EIR's.¹³⁴ The city of Walnut Creek, California stopped issuing building permits "except for such trivial projects as swimming pools."¹³⁵ All new construction in Santa Barbara County was halted. A spokesman for the State Chamber of Commerce said, "I think labor is going to be up in arms about this. It will mean a loss of jobs."¹³⁶

Ten days after *Friends*, the Los Angeles city attorney issued an opinion indicating the decision applied to conditional uses, building permits, leases, community redevelopment projects, grading permits, connection permits, variances, subdivisions, franchises, sewer connection permits, supplemental use districts, drill sites within oil drilling districts, and zone changes. When permits were issued, a disclaimer was attached indicating that they might later be revoked. Such a practice seemed highly questionable on discretionary permits, but technically no authority existed to deny a building permit if it complied with existing ordinances. The city attorney recommended that the City Building Code be amended to authorize denial.¹³⁷

Meanwhile, on the East Coast, the Governor of Connecticut ordered state bodies (impliedly excluding local governments) to prepare evaluations, including an analysis of short versus long-term costs and benefits, of projects directly undertaken by state bodies or funded in

132. Santa Monica Evening Outlook, Sept. 27, 1972, at 1, col. 3.

133. Fradkin, *Court Ruling on Ecology Reports on Private Projects Stirs Confusion*, Los Angeles Times, Oct. 1, 1972, § C, at 8, col. 1.

134. *Id.*

135. *Id.* col. 2.

136. *Id.* cols. 2 & 3.

137. Reibschied, *City Attorney Sets Council Guidelines After 'Mammoth'*, Los Angeles Daily Journal, Oct. 5, 1972, at 1, col. 1.

whole or in part by the state.¹³⁸ If environmental statements were required by federal or other state laws, the evaluations covered by the order did not have to be made, but the statements would be considered and reviewed as the order provided. State environmental agencies would comment on and review the evaluations and statements and then forward them to the State Planning Council which makes recommendations to the Governor.

Two days after his colleague in Connecticut issued the rather mild NEPA-like order, California's Governor Reagan held an emergency session of his cabinet. He asked the attorney general to seek modification of the *Friends* decision so that it could not be applied retroactively to permits issued before the decision. Legal officials from cities and counties throughout California "jammed" a meeting sponsored by the California District Attorneys and County Counsels Association to sort out the effects of the ruling, many indicating they would seek to limit retroactivity. Others announced a decision to seek a moratorium on compliance with the Act until procedures could be worked out. Meanwhile, San Diego, San Francisco, San Jose, and Santa Cruz ordered moratoriums on the issuance of building permits.¹³⁹

On October 10, 1972, the attorney general announced he would seek a modification of the ruling to limit its retroactivity. He indicated he might also ask the court to authorize a moratorium of several months to work out procedures. But he noted that legislation would still be necessary. He indicated that one question to be resolved was whether the government or the developer should pay the cost of the EIR. He said another issue was whether a negative EIR should preclude a local government from approving a project.¹⁴⁰

Of course, there were some, including local government officials, who applauded the decision, and there was a good deal of over-reaction. For one, there simply was not enough legal manpower around to challenge all wrongfully issued permits. Ninety-nine out of a hundred projects would get through for that reason alone. But on October 19, 1972, potential legal manpower was supplied.

In *La Raza Unida v. Volpe*,¹⁴¹ a federal district court in California

138. Exec. Order No. 16, Oct. 14, 1972 (Conn.).

139. Los Angeles Times, Oct. 7, 1972, pt. 2, at 1, col. 5.

140. Lembke, *Younger Will Seek Exclusions from Ecology Impact Reports*, Los Angeles Times, Oct. 11, 1972, at 3, col. 1.

141. 57 F.R.D. 94 (N.D. Cal. 1972).

decided that J. Anthony Kline, of San Francisco-based Public Advocates, Inc., was entitled to attorneys' fees and expert witness fees for successfully enjoining a freeway. The court's rationale in this "unprecedented ruling"¹⁴² was that the suit helped effectuate a strong congressional policy, benefited numerous persons interested in environmental preservation, and that private parties should not be discouraged by economic burdens from bringing such actions against public agencies. While *La Raza Unida* was not a NEPA suit, its application to other environmental lawsuits might suggest the attraction of a good deal of legal talent to attack environmental degrading actions by governmental agencies.

A few days later, *Friends* could have been used by the federal district court as precedent for its ruling in *McLean Gardens v. National Capital Planning Commission* (NCPC).¹⁴³ The NCPC "may make a report and recommendation to the Zoning Commission of the District of Columbia on proposed amendments of the zoning . . . maps,"¹⁴⁴ and when asked to approve site plans for a large-scale planned development, the Zoning Commission "shall submit the application . . . to the [NCPC] for review and report."¹⁴⁵ It was clear that the NCPC had power only to recommend and not to deny. But the court concluded that the NCPC's role was a major federal action and that the 3,000-person planned unit development proposed for McLean Gardens would have a significant impact on the environment. The court therefore ordered an injunction pending preparation of an EIS by the NCPC.

The result in *McLean Gardens* is not surprising because NEPA clearly covers publicly-permitted private projects.¹⁴⁶ The decision is

142. Los Angeles Times, Oct. 23, 1972, pt. 2, at 2, col. 1.

143. 4 ERC 1708 (D.D.C. 1972).

144. 40 U.S.C. § 71g(a) (1970). While the court cites this provision with respect to large-scale planned development, a review of the Zoning Regulations of the District of Columbia suggests approval of such development may not actually involve an amendment.

145. D.C. CODE ANN. § 7501.4 (Supp. V. 1972).

146. Compare *Citizens Ass'n v. Zoning Comm'n*, 477 F.2d 402 (D.C. Cir. 1973). The NCPC had adopted a plan calling for low density and park development along the waterfront in Georgetown. A study to implement the plan had been undertaken. But owners announced plans to build commercial developments which would be permitted by the existing zoning. The Commission froze development for a time pending a hearing to consider adoption of a two-year moratorium for com-

in accord with *Friends* and reinforces the practice that the EIR should be prepared by (or under the direction of) the planning commission and should accompany the commission's traditional report to the decision-makers who actually approve the development.

While California attorneys were preparing to seek modification of the *Friends* decision, the Washington (State) Court of Appeals¹⁴⁷ decided that the state's NEPA-like highway law¹⁴⁸ did not apply to a highway for which no public hearings were scheduled after August 9, 1971, an operative date contained in the statute. A dissenting opinion stated that since Washington's more general NEPA-like law¹⁴⁹ took effect prior to the trial, that law should be applied to the highway acquisition for which landowners were demanding an EIS.

On November 3, 1972, some 25 months after CEQA's enactment, environmentalists represented by the Planning and Conservation League with the backing of builders and construction workers groups filed a petition with the Supreme Court of California. That they cooperated was unique enough, but their lawsuit was even more unique—a demand that the court order the state to develop guidelines.¹⁵⁰ The fact that it took the CEQ only four months to develop interim guidelines for NEPA said much about the state agency's relative enthusiasm for CEQA.

Then on November 6, 1972, the Supreme Court of California modi-

pletion of the implementation study. After the hearing, the Commission rejected the moratorium proposal.

Without citation of authority, the court states that NEPA requirements for an EIS "do not apparently apply to actions of the District of Columbia Government unless federal financial assistance is involved in individual District projects." *Id.* at 410. But citing NGPC, Guidelines for the Protection and Enhancement of Environmental Quality in the National Capitol Region, Aug. 6, 1972, 1 ELR 46034, the court indicates that "[w]here . . . the potential environmental effects of the Commission's decision are substantial, it must at least consider the environmental issue to fulfill its public interest mandate." *Id.*

While the court appears to be saying that D.C. agencies issuing permits do not have to complete an EIS, it is hard to distinguish *McLean Gardens*. One distinction might be that the NGPC is not a D.C. agency; it is the planning commission for D.C., but its jurisdiction is broader. Another possible distinction is that the non-action (failure to change the zoning) was a non-action. No permit issuance was involved.

147. *State v. Burch*, 4 ERC 1718 (1972).

148. See notes 36-39 and accompanying text *supra*.

149. See notes 40-43 and accompanying text *supra*.

150. Dreyfuss, *Environmentalists File Suit on Impact Reports*, Los Angeles Times, Nov. 3, 1972, pt. 2, at 1, col. 5.

fied its *Friends* opinion by deleting footnote 10,¹⁵¹ which had so frightened local government officials, and by adding several points to the opinion. Its addition indicated that a common sense approach should be utilized and that, ordinarily, the construction, improvement, or operation of an individual dwelling or a small business would not require an EIR. But the court declined to apply its decision only prospectively. The court noted that most developments would not require an EIR and that many permits issued after CEQA and before *Friends* were secure because of statutes of limitations or laches. For the same reasons, and because the court presumed "that governmental agencies charged with responsibilities under the act have been performing their duties [during the past 22 months] . . . and can now draw upon their planning and experience in the public sector to aid in solving whatever problems they may have in the private sector,"¹⁵² the court refused to stay the effective date of its order. Moreover, the court opined, delay in development was implicit in the legislature's decision to require EIR's. Of course, the court well knew that local governments had been dragging their feet on implementing EIR's for their own projects.

G. CEQA Is Amended

Those less than environmental purists having essentially no further judicial route turned to the legislature. The California legislature convened on November 8, 1972. It was scheduled to adjourn on December 1. Two bills amending CEQA were before the legislature, both being amended versions of bills introduced in February¹⁵³ and March.¹⁵⁴ Assemblyman John Knox, the principal author of CEQA, introduced a bill that undercut CEQA more than the other bills.

On December 22, 1972, over 27 months after CEQA was enacted, the California Resources Agency finally sent out draft guidelines for environmental impact reports. Given the legislative efforts, it was a shot in the dark. For on December 1, 1972, the Knox bill was signed

151. See note 128 and accompanying text *supra*. The citations to the *Friends* opinion in this article are to the modified opinion.

152. 8 Cal. 3d at 273, 502 P.2d at 1066, 104 Cal. Rptr. at 778.

153. See note 74 *supra*.

154. See note 79 *supra*.

by the Governor, effective four days later. It stated its intent only "to declare and clarify existing law."¹⁵⁵

The first NEPA-like act adopted by a state became the first NEPA-like act to be amended. Neither side was happy with the revisions, thereby suggesting that it was a rather good compromise. It was also a good test of the power of the environmentalists versus the power of the developers in a state whose people, coming from every part of the country, are as representative of America as any. The amended CEQA passed after the expenditure of hundreds of thousands, if not millions, of man-hours by the decision-makers, lobbyists, and lobbyists' clients. What, then, did this titanic struggle, made by informed, skilled, and resource-backed persons, produce? What does it suggest as a primogeniture for other NEPA-like state acts? What does it suggest for NEPA, if NEPA should ever become embroiled in an amendment fight?

As amended, CEQA is a much longer and complex act. It continues to cover "activities involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use."¹⁵⁶ The Act applies to "discretionary projects . . . including . . . enactment and amendment of zoning ordinances, the issuance of zoning variances, the issuance of conditional use permits and the approval of tentative subdivision maps."¹⁵⁷ The Act does not apply to "ministerial projects."¹⁵⁸ All public agencies are to develop guidelines consistent with those adopted by the Secretary of the Resources Agency.¹⁵⁹ The guidelines are to include criteria to determine when a project does not have a significant effect on the environment.¹⁶⁰ Emergency repairs to public service facilities are exempt.¹⁶¹ The legislature defines significant effect projects as follows:

- (a) A proposed project has the potential to degrade the quality of the environment, curtail the range of the environment, or to achieve short-term, to the disadvantage of long-term, environmental goals;

155. CAL. PUB. RES. CODE § 21060 (West Supp. 1972).

156. *Id.* § 21065(c) (West Supp. 1972).

157. *Id.* § 21080(a).

158. *Id.* § 21080(b). For this decision's significance, see notes 207-08, 214-15 and accompanying text *infra*.

159. CAL. PUB. RES. CODE § 21082 (West Supp. 1972).

160. *Id.* § 21084.

161. *Id.* § 21085.

- (b) The possible effects of a project are individually limited but cumulatively considerable;
- (c) The environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly.¹⁶²

But environment is narrowly defined to include "the physical conditions which exist within the area which will be affected by a proposed project."¹⁶³ A federal EIS can be submitted as an EIR if the EIS covers all matters required of an EIR.¹⁶⁴ The legislation provides for publication of documents, like the "102 Monitor,"¹⁶⁵ which will contain guideline revisions and announcements of completed EIR's.¹⁶⁶ Public agencies may charge fees for the preparation of an EIR.¹⁶⁷ A multifaceted project with public and private activities undertaken pursuant to a redevelopment plan is considered a single project requiring a single EIR.¹⁶⁸ An additional item added to the matters an EIR should cover is "[t]he growth-inducing impact of the proposed action."¹⁶⁹ An environmental impact report is defined as "an informational document."¹⁷⁰

Projects involving only planning were not covered in CEQA as initially enacted; amendments also exempted "a project involving only feasibility . . . studies."¹⁷¹ But the statute warned that planning and feasibility studies "shall nevertheless include consideration of environmental factors."¹⁷²

In addition to consulting with governmental agencies, state agencies are authorized to consult with "any person who has special expertise with respect to any environmental impact involved."¹⁷³ Another sec-

162. *Id.* § 21083.

163. *Id.* § 21060.5.

164. *Id.* § 21083.5.

165. For the California attorney general's recommendation see note 72 and accompanying text *supra*.

166. CAL. PUB. RES. CODE § 21088 (West Supp. 1972).

167. *Id.* § 21089. This was also a recommendation of the California attorney general.

168. CAL. PUB. RES. CODE § 21090 (West Supp. 1972).

169. *Id.* § 21100(g). For the other six matters to be covered in an EIR see note 17 *supra*.

170. CAL. PUB. RES. CODE § 21061 (West Supp. 1972).

171. *Id.* § 21102.

172. *Id.* § 21102. Section 21150 was also amended to exclude feasibility as well as planning studies. See note 27 *supra*.

173. CAL. PUB. RES. CODE § 21104 (West Supp. 1972).

tion was amended to require that an EIR be filed "with the appropriate local planning agency of any city or county."¹⁷⁴ When a governmental entity is required to furnish a planning report,¹⁷⁵ the EIR may be a part of that report.¹⁷⁶

Essentially, local agencies are directed to comply with the Act in the same manner as state agencies. The provision exempting local agencies that had conservation elements of general plans was dropped.¹⁷⁷ If the state orders a local agency to carry out a project, then any EIR prepared is "to be limited to consideration of those factors and alternatives which will not conflict with such order."¹⁷⁸ Local agencies approving projects can require the proposer to prepare an EIR or to submit information necessary to determine significant effect.¹⁷⁹

A long subchapter entitled "limitations" includes an amendment that provides a means for resolving which agency is to be the lead agency in preparing an EIR if more than one has competency.¹⁸⁰ No EIR is required if a project changes, unless there are "substantial" changes or the circumstances under which the project is being undertaken substantially change.¹⁸¹ If an agency fails to make a determination of significant effect on the environment, its decision to carry out or approve the project can be attacked within 180 days.¹⁸² If a determination is alleged to be erroneous, attackers have 30 days to challenge.¹⁸³ "In any such action, the court shall not exercise its independent judgment on the evidence but shall only determine whether the act or decision is supported by substantial evidence . . ."¹⁸⁴

The selection of this standard for review is of obvious moment compared to a court's alternatives of *de novo* review or considering *any* supporting evidence. The Public Utilities Commission, a very powerful agency that is constitutionally based in California, is treated

174. *Id.* § 21105.

175. *See* note 28 and accompanying text *supra*.

176. CAL. PUB. RES. CODE § 21151 (West Supp. 1972).

177. The provision is reproduced in text at note 28 *supra*.

178. CAL. PUB. RES. CODE § 21154 (West Supp. 1972).

179. *Id.* § 21160.

180. *Id.* § 21165.

181. *Id.* § 21166.

182. *Id.* § 21167.

183. *Id.*

184. *Id.* § 21168.

deferentially by the provision that a writ of mandate against it can come only from the Supreme Court of California.¹⁸⁵

The developer-builder-local government coalition scored with a provision that validates all permits issued on or before the effective date of the amendments unless the validity of the permits had already been adjudicated or actions had been filed. Even if actions had been filed, permits are validated if substantial construction has occurred and substantial liabilities have been incurred.¹⁸⁶

The same interest group also persuaded the legislature to enact a moratorium on publicly-permitted private projects. The new Act does not apply to such projects until the 121st day after its effective date, except for those projects that had been or were being litigated. But in the interim, a public agency was not prohibited "from considering environmental factors in connection with the approval or disapproval of a project and from imposing reasonable fees."¹⁸⁷ CEQA does not apply to public agencies involved in disaster relief.¹⁸⁸ Finally, some doubt having been raised, the statute makes it clear that CEQA is not a limitation or restriction on other powers of agencies and, specifically, if inconsistent with the California Coastal Zone Conservation Act of 1972, that Act would prevail.¹⁸⁹

The day after CEQA as amended became effective, a federal district court enjoined a highway until a federal EIS and state EIR were prepared.¹⁹⁰

H. *Reactions to CEQA Amendments*

With the legislature now adjourned, the Resources Agency went back to work on the guidelines, those unhappy with the legislation conducted a post-mortem, and builders stood in line to secure building permits during the moratorium.

185. *Id.* § 21168.6.

186. *Id.* §§ 21169-21170. These statutes are discussed in *San Francisco Plan & Urban Renewal Ass'n v. Central Permit Bureau*, 30 Cal. App. 3d 920, 106 Cal. Rptr. 670 (1973). Because of these amendments, the court held that no EIR was required for a permit issued prior to the effective date of the statutes.

187. CAL. PUB. RES. CODE § 21171 (West Supp. 1972). Compare the experience in North Carolina where local governments have discretion to apply EIS's. See note 110 and accompanying text *supra*.

188. CAL. PUB. RES. CODE § 21172 (West Supp. 1972).

189. *Id.* § 21174. The Coastal Act is in CAL. PUB. RES. CODE § 27000 *et seq.* (West Supp. 1972).

190. *Sierra Club v. Volpe*, 351 F. Supp. 1002 (N.D. Cal. 1972).

The post-mortem suggested that the amendments, "hammered out on the back of envelopes and cocktail napkins . . . in order to hold off chaos,"¹⁹¹ contained many ambiguities and inconsistencies. The bill was called "a collection of trade-offs, a bone for the bankers in one section that is balanced by goodies for the Planning and Conservation League in another."¹⁹² Many of the trade-offs were self-evident. But the discretionary-ministerial¹⁹³ distinction needed some explanation. The intent was to resolve the environmental issue early, "such as when a developer applies for zoning, rather than late in the game when he brings in his final tract map."¹⁹⁴

The environmentalists explained that they sought to rid CEQA of the conservation element provision because many such elements "took up half a page . . . they were perfunctory and meant that projects would have just been rubber-stamped."¹⁹⁵ Definitions of words like "environment," "project" and "significant effect" were alleged to be "either weak or absent."¹⁹⁶ The definition of environment as "physical" meant that CEQA did not "extend to socio-economic factors, such as a project's impact on schools" ¹⁹⁷ The *Friends of Mammoth* attorney complained:

I was trying [a] . . . case. . . . I made my usual point that the principal value of an EIR to a growing community is that it would contain a cost-benefit analysis. . . . [Seven minutes after the Governor signed the bill] . . . my opposing counsel handed the judge a copy of the bill and called his attention to § 21060.5 which defines "environment" The judge . . . said he would not regard an EIR as inadequate that did not include . . . economic data. The absence of such information in an EIR on a project in a growing community renders the report practically useless in my judgment.¹⁹⁸

But perhaps the amendment dealing with growth-inducing impacts was a partial victory for the environmentalists.

191. Pryor, *Clarification of State's Environmental Policy Due*, Los Angeles Times, Dec. 25, 1972, pt. 1, at 3, col. 5.

192. *Id.*

193. See notes 157-58 and accompanying text *supra*.

194. See Pryor, *supra* note 191.

195. *Id.*

196. *Id.*

197. *Id.*

198. Letter from John C. McCarthy to Assemblyman John Knox, Dec. 6, 1972.

One commentator felt that the inclusion of projects that are individually limited but cumulatively considerable could cover every new single-family dwelling.¹⁹⁹ Reacting to the provision about projects that "will cause substantial adverse effects on human beings," one attorney asked, "What the hell does that mean? . . . He said he asked Assemblyman Knox and didn't get an answer."²⁰⁰ The fact that an EIR is defined as an informational document does not answer the question of "what would happen if an EIR predicted dire consequences from a project but was ignored."²⁰¹

The effect on building permit issuance was confusing. Since October, builders had been applying for permits anticipating a moratorium. Applications continued at a heavy rate after CEQA was amended, but when the permits were taken to lending institutions, builders found the lending institutions still wary. Until more clarification, one banker reported "California is Deadsville, U.S.A., in the financial community."²⁰² While in October building permits were being issued at near record levels statewide, by February 1973, the evidence was mixed. In February 1973, still within the moratorium period, the City of Los Angeles issued \$93 million worth of permits, down from \$142 million the previous February. Permits for Los Angeles County for the second of the same two periods were up about 50% in total amount. In the City of San Diego, the dollar value of permits issued was down to about 20% of the previous February.²⁰³ If California homebuilders were really concerned about CEQA dampening housing construction, however, their sales forecasts did not reflect the concern.²⁰⁴

I. CEQA Guidelines

On December 22, 1972, twenty-seven months after directed to do so, the Resources Agency mailed out interim guidelines for comment. Twenty-eight and one-half months after CEQA passed, the guide-

199. See Pryor, *supra* note 191.

200. *Id.*

201. *Id.*

202. Jones, *Stampede for Building Permits Hits Roadblock*, Los Angeles Times, Dec. 14, 1972, pt. 1, at 3, col. 5.

203. Los Angeles Times, Mar. 25, 1973, pt. X, at 21, col. 1.

204. Turpin, *Southland Homebuilders Forecast 37.5% Increase in '73 Sales*, Los Angeles Times, Apr. 1, 1973, pt. X, at 1, col. 4.

lines were final.²⁰⁵ A covering letter explained that the guidelines did not limit matters to physical effects because of CEQA's language on adverse effects on human beings and on growth-inducing impact.

On the effect of an EIR, the Agency declared:

An EIR may not be used as an instrument to rationalize approval of a project, nor do indications of adverse impact, as enunciated in an EIR, require that a project be disapproved—public agencies retain existing authority to balance environmental objectives with economic and social objectives.²⁰⁶

A definition of a discretionary project was included:

[A]n activity defined as a project which requires the exercise of judgment, deliberation, or decision on the part of the public agency or body in the process of approving or disapproving a particular activity, as distinguished from situations where the public agency or body merely has to determine whether there has been conformity with applicable statutes, ordinances, or regulations.²⁰⁷

That, of course, was to be distinguished from a ministerial project:

[T]hose activities defined as projects which are undertaken or approved by a governmental decision which a public officer or public agency makes upon a given state of facts in a prescribed manner in obedience to the mandate of legal authority. With these projects, the officer or agency must act upon the given facts without regard to his own judgment or opinion concerning the propriety or wisdom of the act although the statute, ordinance, or regulation may require, in some degree, a construction of its language by the officer.²⁰⁸

The term "project" is defined as *not* including "[t]he submittal of proposals to a vote of the people of the State or of a particular community."²⁰⁹ There is no specific basis for the exemption in the statute. Perhaps it was thought that when the people act directly, there is no practical way to require them to prepare an EIR. Perhaps it was thought that the people would always be acting by initiative or referendum and, since proposals for legislation are not covered by

205. Resources Agency of California, *Guidelines for Implementation of the California Environmental Quality Act of 1970*, Feb. 5, 1973. 14 CAL. ADM. CODE § 15000 *et seq.* (1973) [hereinafter cited as *Guidelines*].

206. *Id.* § 15012.

207. *Id.* § 15024.

208. *Id.* § 15032.

CEQA as they are in NEPA, that when the people propose to legislate, no EIR is required. On the other hand, one could argue that some legislative acts are covered by CEQA, for example, the enactment and amendment of zoning ordinances. The people can enact and amend zoning ordinances, sometimes by initiative,²¹⁰ and usually by referendum. Since an ordinance is always of some public agency, it would make sense to impose upon the local government the duty of preparing an EIR on a proposal to be submitted to the people so that the people would be better informed. If the people are to vote on a bond issue for a large-scale project proposed by the state, such as a water project, the guidelines will hopefully not be construed in a way that would make the preparation of an EIR unnecessary.

The guidelines express the pious hope that “[t]he requirement for the preparation of an EIR should not cause undue delays in the processing of applications for permits or other entitlements to use.”²¹¹ The guidelines do not define a “substantial change” in the project, which would require a new EIR, but do give an example, namely, “a change in the proposed location of the project.”²¹² The guidelines make it clear that the EIR’s on multiple and phased projects should be addressed to the ultimate or larger project rather than to the sub-parts of the project.²¹³

Since each public agency is to develop its own guidelines, the Resources Agency guidelines indicate that each public agency should determine which of its actions are ministerial. But in the absence of any discretionary provision contained in a local ordinance, the issuance of building permits and business licenses, and the approval of final subdivision maps, individual utility service connections and disconnections are presumed ministerial.²¹⁴

More and more cities and counties in California are using the issuance of a building permit as a last, *discretionary* look at a project

209. *Id.* § 15037(b)(4).

210. *Bayless v. Limber*, 26 Cal. App. 3d 463, 102 Cal. Rptr. 647 (1972). See generally D. HAGMAN, C. MARTIN & J. LARSON, CALIFORNIA ZONING PRACTICE §§ 4.1-4.7 (1969, Supp. 1973).

211. Guidelines § 15054.

212. *Id.* § 15067(b).

213. *Id.* § 15069.

214. *Id.* § 15073.

to determine whether it is desirable.²¹⁵ Building permits are rapidly becoming an ad hoc land-use control device in California; indeed, the *Friends of Mammoth* case involved a building permit. Thus such permits may be more discretionary than the guidelines suggest. Final subdivision map approval is rather ministerial because of a statutory provision: "A governing body shall not deny approval of a final subdivision map . . . if it has previously approved a tentative map . . . and if it finds that the final map is in substantial compliance with the previously approved tentative map."²¹⁶ Individual utility service connections and disconnections would generally not seem to require an EIR in any event because of an absence of significant effect, though perhaps the ministerial nature of the action is necessary to avoid compliance on the ground that the "effects of a project are individually limited but cumulatively considerable."²¹⁷

In determining significant effect, the guidelines indicate that both primary and secondary consequences should be included:

Primary consequences are immediately related to the project (the construction of a new treatment plan may facilitate population growth in a particular area), while secondary consequences are related more to primary consequences than to the project itself (an impact upon the resource base, including land, air, water and energy use of the area in question may result from the population growth).²¹⁸

That guideline is either unintelligible, confuses primary with secondary effects, or includes tertiary effects. It may well be that man's language is not capable of anything better.

Examples of consequences which may have a significant effect on the environment include those where a project "is in conflict with environmental plans and goals that have been adopted by the community where the project is to be located."²¹⁹ Does that mean that projects should accord with master plans? They are supposed to now.

The guidelines attempt to give meaning to the individually limited but cumulatively considerable projects:

215. See, e.g., *Selby Realty Co. v. City of San Buenaventura*, —Cal. 3d—, 514 P.2d 111, 109 Cal. Rptr. 799 (1973).

216. CAL. BUS. & PROF. CODE § 11549.6 (West Supp. 1972).

217. CAL. PUB. RES. CODE § 21083(b) (West Supp. 1972).

218. Guidelines § 15081(b).

219. *Id.* § 15081(c)(1).

NEPA EFFECTS

A project may impact on two or more separate resources where the impact on each resource is relatively small. If the effect of the total of those impacts on the environment is significant, an EIR must be prepared. This mandatory finding of significance does not apply to two or more separate projects where the impact of each is significant.²²⁰

The guidelines could be a meaning of the statutory language, but one would not be surprised to find litigants willing to attack such a narrow definition.

In several places, the guidelines indicate that when an EIR is to be prepared, the proponent of the project may transmit information "in the form of a draft EIR, but the responsible agency must examine this draft and the information contained within it to assure itself of its accuracy and objectivity"²²¹

CEQA requires that the guidelines include a list of classes of projects which have been determined not to have a significant effect on the environment. The guidelines call these classes "categorical exemptions," and some are controversial. New construction of residences or motels involving no more than four dwelling units, and commercial buildings designed for less than 20 occupants, are excluded if not built in conjunction with two or more such units. Utilities and accessory uses to such buildings are also excluded.²²² Environmental purists are unhappy with such exclusions.

While the statute includes the issuance of zoning variances, the guidelines categorically exclude "side yard and set back variances not resulting in the creation of any new parcel nor in any change in land use or density."²²³ Since use variances are generally improper in California,²²⁴ one would not expect to have to prepare an EIR except in connection with a height variance.

A present controversial provision of NEPA is likely to become the most controversial aspect of CEQA. The guidelines provide categorical exemptions for: "actions taken by regulatory agencies, as authorized by state law or local ordinance, to assure the maintenance, restoration, or enhancement of a natural resource, including but not limited

220. *Id.* § 15082(c).

221. *Id.* § 15085(a).

222. *Id.* § 15103.

223. *Id.* § 15105(a).

224. D. HAGMAN, C. MARTIN, & J. LARSON, CALIFORNIA ZONING PRACTICE § 7.49 (Supp. 1973).

to wildlife preservation.”²²⁵ And for: “actions taken by regulatory agencies, as authorized by state law or local ordinance, to assure the maintenance, restoration, enhancement, or protection of the environment.”²²⁶ These provisions are the state equivalent of the federal guidelines: “environmental protective regulatory activities concurred in or taken by the Environmental Protection Agency are not deemed actions which require the preparation of environmental statements under section 102(2)(C) of the Act.”²²⁷

Some authority indicates a refusal to exempt EPA from preparing an EIS for its regulatory activities.²²⁸ For example, in *Anaconda Co. v. Ruckelshaus*,²²⁹ EPA had published a rule under the Clean Air Act which could have had the effect of putting a copper smelter out of business. EPA argued that it could consider nothing other than air purity under its powers; it could not consider other environmental, social, or economic effects. EPA also claimed it was not required to prepare an EIS. For the federal district court, the issue was an easy one. While admitting that Congress could exempt EPA, the court said that the matter involved a rather simple syllogism:

Major Premise: All federal agencies must file a NEPA statement.

Minor Premise: EPA is a federal agency.

Conclusion: EPA must file a NEPA statement.²³⁰

These kinds of lawsuits have led to the realization that NEPA is a two-edged sword. Agencies charged with improving the environment must prepare their own EIS's in connection with regulatory activity aimed at preserving the environment. That could considerably delay matters; moreover, when fully confronted with the impact of their regulations on other environmental, economic, and social concerns,

225. Guidelines § 15107.

226. *Id.* § 15108.

227. CEQ, Statements on Proposed Federal Actions Affecting the Environment, § 5(d), 36 Fed. Reg. 7724 (1971).

228. Barfield, *Environment Report/Water Pollution Act Forces Showdown in 1973 Over Best Way to Protect Environment*, 4 NAT'L J. 1871, 1874 (1972). See also the North Carolina Governor's recommendations discussed at notes 107-08 and accompanying text *supra*.

229. 352 F. Supp. 697 (D. Colo. 1972), *rev'd*, 482 F.2d 1301 (10th Cir. 1973). Federal courts of appeal in the Third, Fourth, Sixth, and D.C. Circuits have concluded EPA is not subject to the EIS requirement. See, e.g., *Buckeye Power, Inc. v. EPA*, 481 F.2d 162, 174 (6th Cir. 1973).

230. 352 F. Supp. at 697.

it is very likely, assuming they are responsible, that the agencies will back off rigorous pursuit of narrow environmental goals. If they do not do so, what would lead to the assumption that the development-oriented agencies will, being fully informed by their own EIS's, pay any attention to the environmental aspects of those EIS's? And if the courts begin to hold that a negative EIS means that a project cannot be built, and if an EIS of an environmental regulatory agency shows tremendous adverse externalities resulting from a regulation to improve a narrow part of the environment, one would assume that the courts would enjoin the regulation.

The guidelines indicate that categorical exemptions involving new construction of small structures, minor alterations to land, alterations in land-use limitations, and accessory structures may not apply in all cases because such activities may produce a significant effect in particularly sensitive environments. In addition, the exemptions "are inapplicable when the cumulative impact of successive projects of the same type in the same place, over time is significant—for example, annual additions to an existing building"—though small additions are usually a categorical exemption.²³¹

The guidelines, while pointing out that CEQA requires no public hearings, nevertheless encourage widespread public participation, including hearings. Hearings may be held in conjunction with normal planning activities, and a draft EIR should be available for use at the hearing. The hearing should occur at a time when the purposes and goals of CEQA would be best facilitated,²³² normally, at an early date in a project's life. The guidelines can be modified, and the Secretary of the Resources Agency expressed an intent to modify them in August 1973. They are not likely to become less complicated, although the Secretary expressed that hope.

J. *Reactions to Guidelines*

Predictably, the environmentalists were unhappy with the guidelines, particularly those features which did not have strong statutory support. The categorical exemption for regulatory agencies was particularly disliked because it included such agencies as the Public Utilities Commission, never a favorite of environmentalists. The policy statement that environmental concerns were to be balanced

231. Guidelines § 15114.

232. *Id.* §§ 15164-15165

by economic concerns also troubled environmentalists. While the draft guidelines had included in the definition of "significant effect" those projects which generated serious adverse public reaction or would displace large numbers of people,²³³ the final guidelines left those provisions out. The fact that building permits and final tract maps generally required no EIR bothered environmentalists, as did the failure of the guidelines to adopt the *Friends* dictum "if the adverse consequences . . . can be mitigated . . . the proposed activity . . . should not be approved."²³⁴

But the planning agencies began to comply. In Los Angeles County, public hearings were stopped on all zoning cases for nine weeks to permit the staff to prepare the EIR's. The planning director recommended that fees be increased and anticipated that all zoning cases would take at least an additional 30 days for processing to permit the public and other agencies to participate.²³⁵

II. A CRITIQUE

A. *Some Very Hard Questions*

I. Balance

One can grant that the environment has not been given its due in the past and one can carry no brief for environmentally destructive growth and yet still not support an ethic of physical environmental protection that fails to balance economic and social needs. Both growth and environmental protection excesses are wrong. Just as we learned that "maximum feasible participation"²³⁶ of the poor in the poverty program was bad public policy if construed to mean all possible participation, it is not good public policy to apply NEPA's observance of national environmental policy "to the fullest extent

233. Compare WASH. REV. CODE ANN. § 47.04.110 (Supp. 1972). In minimizing and eliminating "effects which are adverse to the . . . human environment. . . [s]uch factors as the dislocation of people . . . residences . . . [and] businesses . . . shall be considered" Since California considers the human environment, dislocation might well be considered a significant effect anyway; see note 162 and accompanying text *supra*.

234. Dreyfuss, *Ecologists Fear Loss of Important Weapon*, Los Angeles Times, Feb. 18, 1973, pt. 1, at 3, col. 5. The quoted language is from footnote 8 of the court's opinion.

235. Donaldson, *Zoning Hearings May be Halted for Ecology Reports to Catch Up*, Los Angeles Times, Mar. 11, 1973, pt. W, at 10, col. 1.

236. Economic Opportunity Act § 102(a) *codified as* 42 U.S.C. § 2791(f) (1) (1970)

possible"²³⁷ as if it meant to "every" extent possible regardless of the adverse externalities to everything else that matters.

Therefore, to the extent one believes NEPA and NEPA-like state acts have merit at all, the preferred approach is to balance short and long-term effects, to balance man-made environmental costs and benefits against nature's costs and benefits, and to make social and economic needs legitimate concerns.

2. Race and Poverty

If one looked at most environmental acts of the recent decade, or of any decade, or if one looked at the application of NEPA and NEPA-like state acts, one would find little of a wealth redistribution feature about them. Most environmental problems are a matter of aesthetics, and only the affluent can afford aesthetics. Of course, everyone can benefit from clean air, and since the poor live where it is dirtiest, they can benefit more than anyone. But a job to one psychologically dying because he is un- or underemployed is a more basic necessity than clean air. The poor may not be able to afford the clean air benefit. Even a non-growth economy is a regressive burden on the poor; their jobs go first in such a situation. And if resources to preserve the environment are taken from programs that might otherwise take care of the unemployed in a non-growth economy, the burden is double. It is a triple burden if the financing of the environmental protection programs constitute a regressive tax on the poor. For example, suppose every automobile in America is required to have a \$200 smog device. That would be half the price of a poor man's car, five per cent of a rich man's.

NEPA is supposed to require an EIS for proposed legislation. The requirement is generally ignored. If environmental legislation were subject to a cost-benefit analysis as it relates to the poor, what would it show? Not much relative benefit to the poor, one might wager.

These thoughts are not unique with me, of course, nor are they new. In the summer of 1969, I spoke with OEO officials about the need to strengthen the environmental aspects of the National Health and Environmental Law Program (NHELP), an OEO legal backup center located at UCLA, so that the poor would have an effective voice in dealing with the emerging environmental movement. Nine days after NEPA became law, in a paper entitled "The Environ-

237. 42 U.S.C. § 4332 (1970).

mentalists v. the Poor,"²³⁸ I thought through a scenario of what the new environmental movement meant to the poor. I tried to deliver the message to OEO officials in succeeding months. We agreed that the concerns of then-fledgling institutions such as EPA were not of primary interest to the poor; but the OEO officials, being too close to the poverty movement, did not seriously believe the environmentalists could take over. It was a politically stupid move. OEO rejected advice that poverty problems should be redefined as environmental problems. For example, rats in the central cities could have been redefined as a solid waste problem, and OEO officials concerned with rat bites could then be in a position to work with the solid waste fraternity.

As OEO's resources dried up in accord with my scenario, OEO became less and less able to relate to the environmental movement; OEO officials became more bitter. I finally gave up and shifted my attention to EPA. If the poverty types could not be persuaded to take an interest in the environment, perhaps the environmental types could be persuaded to take an interest in poverty. An EPA employee had recently supervised the writing of "Our Urban Environment and Our Most Endangered Species,"²³⁹ an account showing that environmental degradation is a more crushing burden on the poor than on others. Columnist Jack Anderson²⁴⁰ embarrassed EPA by recounting the suppression of the Report, so it was finally released; the EPA employee who supervised its writing was discharged.

I thought that EPA could be persuaded to give some attention to the poor as a matter of good politics. But despite an initially favorable reaction to my plea for EPA resource help for NHELP,²⁴¹ my letters and calls about the progress of the proposal went unanswered and, with considerable bitterness, I abandoned the project. EPA no longer needed the poor. Early in 1973, my scenario was complete: the President tried to abolish OEO²⁴² and would have but for judicial intervention.²⁴³

238. D. Hagman, Jan. 9, 1970 (unpublished).

239. ENVIRONMENTAL PROTECTION AGENCY, *OUR URBAN ENVIRONMENT AND OUR MOST ENDANGERED SPECIES* (Sept. 1971).

240. Columns in Washington Post and other newspapers, Dec. 10, 1971, and Dec. 12, 1971.

241. Letter from Donald Hagman to William Ruckelshaus, Mar. 6, 1972.

242. OFFICE OF MANAGEMENT AND BUDGET, *THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1974*, at 122 (1973).

243. *Local 2677, Am. Fed'n of Gov't Employees v. Phillips*, 358 F. Supp. 60 (D.D.C. 1973).

Even if EPA did become subject to NEPA²⁴⁴ and was therefore required to obtain agency comment on its proposals, only a demoralized OEO was around to comment for the poor. That is not to say, of course, that NEPA and NEPA-like state acts could not be administered to take concerns of the poor into consideration. But are they being so administered?

Read *Silva v. Romney*,²⁴⁵ in which the First Circuit upheld an injunction against a low-income housing developer from proceeding with his project because he asked for HUD assistance and therefore had to await preparation of an EIS. That case looks like the now legions of other cases on exclusionary land-use control practices.²⁴⁶ Exclusionary land-use controls being invalidated, the excluders now are turning to the environmental acts to accomplish their purposes. Was plaintiff Silva motivated by concern for the environment or by a concern that poor blacks would be moving into his neighborhood? If both concerns are the same, let us not avoid the problem of classism and racism by dressing it in environmental clothing.

*Town of Groton v. Laird*²⁴⁷ illustrates that some courts will not allow NEPA to be used to justify exclusionary practices. Groton is a resort town with a housing shortage in all but high-rent units. The Navy wished to build a 300-unit housing project in an area zoned for residential densities lower than the Navy had in mind.²⁴⁸ While the Navy concluded that the project was a major one under NEPA, it also concluded that the impact would not be significant. Indicating that the determination was not arbitrary, capricious, abusive of discretion, or unlawful, the court upheld the Navy and, in dictum, indicated it would do so even if the Navy had to meet a substantial evidence test.

244. See notes 225-30 and accompanying text *supra*.

245. 473 F.2d 287 (1st Cir. 1973).

246. See D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 242 (1971) [hereinafter cited as HAGMAN].

247. 353 F. Supp. 344 (D. Conn. 1972). See also *Hiram Clarke Civic Club, Inc. v. Lynn*, 476 F.2d 421 (5th Cir. 1973) where, after conventional exclusionary devices were tried, opponents invoked NEPA to bar a HUD-financed low-income housing project by demanding preparation of an EIS. The court upheld a HUD determination that the 272-unit project did not have such a significant environmental impact as to require the preparation of an EIS.

248. Of course, the court properly notes that the Navy is not subject to local zoning. 353 F. Supp. at 350. See notes 255-58 and accompanying text *infra*.

In its determination of significance, the Navy found that no adverse effect on *humans* was anticipated. The court was not apologetic about this humanistic rather than physical view of the environment. Since Groton had zoned for residential uses, the court found that a project with slight increases in densities (but with no high rise) was not an impact in "‘excess of those created by existing uses in the area.’"²⁴⁹ Such a conclusion is a bit dubious because it would lead one to conclude that a project *built* in an area could have no significant effect if it was *planned* for the area.

But the court focused its environmental eye on the human environment of Navy personnel: "NEPA may not be used by communities to shore up large lot and other exclusionary zoning devices that price out low and even middle-income families."²⁵⁰ While the court admitted NEPA elevated environmental values, the court said that "[p]eople have to have somewhere to live."²⁵¹ The court's reaction to the Groton attorney's suggestion that the Navy consider a site in another town was that the "suggestion smacks of trying to dump the problem into someone else's backyard . . ."²⁵² Moreover, the court noted, the alternative site would involve longer commutes, with attendant traffic and air pollution.²⁵³

Consider who pays the cost of preparing the EIR in California, where it can now be passed on to the applicant; and consider who suffers from the delay of another day in slum housing. Should the cost of the EIR, which might be passed on to the developer in ordinary circumstances, be passed on in the form of rents to the poor?

One is not sanguine, then, when HUD Assistant Secretary Jackson says that "housers and environmentalists are really interested in the same overall objective: the provision of decent, affordable housing in a quality environment for all Americans."²⁵⁴ He gives some examples that document his thesis: an EIS can prevent the removal of existing low- and moderate-income housing; parks in low-income areas can be preserved from highways; low-income housing can be

249. 353 F. Supp. at 349, *citing* Hanly v. Kleindienst, 471 F.2d 823, 830 (2d Cir. 1972).

250. 353 F. Supp. at 350.

251. *Id.* at 351.

252. *Id.*

253. *Id.*

254. Address by Samuel Jackson, Suburban Action Institute, Annual Conference, reported in HUD News, HUD No. 73-28, Jan. 17, 1973.

kept out of areas where other planned public activities make the sites undesirable.

But has NEPA and the NEPA-like state acts been used often enough for those reasons? Are the cases brought to preserve parks or to preserve parks for the poor? Has low-income housing been protected because plaintiffs were interested in low-income housing or because they were against freeways? What is needed is to get the old poverty warrior litigants to utilize NEPA and the NEPA-like state acts and to stop regarding them as threats. They *can* be used to accomplish goals for the poor, even though they seldom have been. Environmental activists should also begin litigating some suits under NEPA to protect the poor, as people, and not just to protect the physical, inanimate environment as if it were a value in itself. Most NEPA cases have been brought by private groups and environmental activists. They owe more sensitivity to the poor. After all, it was the poverty lawyers who opened the door to holdings giving broad standing to plaintiffs, including environmental plaintiffs. Those same environmentalists owe something to the poor.

While environmental activists consider far-out extensions of NEPA and NEPA-like laws, let them consider these thoughts. Is the failure of a city to rid itself of slums and is the failure of the federal government to provide funds for slum removal an *activity* which has a significant adverse environmental impact? Does the building of wall-to-wall high-income housing constitute a significant adverse effect on the environment by creating economic ghettos? What is the adverse effect on environment from a two hour per day average bus trip to integrate schools, a problem which could be eliminated if housing were economically integrated?

3. NEPA and NEPA-like State Acts: The Relation to Land-Use Controls

The traditional local land-use control system has no power to control federal projects. The federal government is sovereign. Even a federal permit, issued to a private entity for a particular location, often entitles the permittee to proceed regardless of local land-use controls.²⁵⁵ A few federal provisions direct federal agencies to consider local planning and land-use regulations with respect to federal activi-

255. HAGMAN § 70.

ties,²⁵⁶ but generally nothing in the local land-use control system inhibits the federal development machines from plunging ahead.²⁵⁷ The federal government does not have its own land-use control system. There being little other restraint at the federal level, and because of the evil of single-purpose federal agencies pursuing their narrow aims with vigor, power, and money, land-use control traditionalists regard NEPA as a step toward reining the federal agencies.

As with the federal government, few constraints bind state governments.²⁵⁸ The states generally have no statewide planning and controls; they merely enable local planning. Of course, state agencies are not generally subject to local planning and controls. The state agencies plunge narrowly ahead.

Just as NEPA and NEPA-like state laws might be regarded as productive when applied to federal and state government development activities, a case might be made for throwing some new NEPA-like legislation at local and special districts engaged in development. They, also, have never been well-disciplined by local planning—special districts could generally override any objections of the general plan-making governments, and the plan-making governments typically ignored their own plans when that suited their purposes.

But a better alternative would also have been simpler—amend traditional planning and control legislation to require more environmental consciousness and to strengthen provisions²⁵⁹ making general purpose and special district governments subject to the then-environmentally stronger traditional planning and land-use controls. That route was seemingly part of the thinking behind CEQA as originally enacted,²⁶⁰ which required EIR's only when the general purpose government had no conservation element. When they did have a conservation element (thus strengthening environmental conscious-

256. *Id.* § 68.

257. That may change. The proposed Land Use Policy and Planning Assistance Act, S. 268, 93d Cong., 1st Sess. (1973), provides:

Sec. 207(a). Federal programs, projects, and activities on non-Federal lands significantly affecting land use . . . shall be consistent with State land use programs which conform to the provisions of this Act, except in cases of overriding national interest, as determined by the President.

258. HAGMAN §§ 68-69.

259. *See* note 29 and accompanying text *supra*.

260. *See* text at note 28 *supra*.

ness) their projects had to accord with that element (thus subjecting local government projects to general planning constraints).

But then came *Friends*.²⁶¹ CEQA, surprisingly, was applied to the issuance of a building and conditional use permit. Such an interpretation made CEQA a complete redundancy of the traditional land-use control system, which is primarily concerned with regulating private development. The fundamental error of the Supreme Court of California, other than its prostitution of the English language over the meaning of "project," was its obsequious attention to NEPA. The court's logic was that whatever NEPA controlled, CEQA controlled. Since NEPA applied to federally-permitted private projects, CEQA applied to locally-permitted private projects. The court completely missed the point that the federal government, unlike local governments, has no land-use control system. Subsequently, the state legislature forgot the reason for the conservation element provision and eliminated it.

The NEPA and NEPA-like state act theory and approach to land-use control is the antithesis of comprehensive land-use control. Local planning and zoning is an outgrowth of nuisance law; NEPA and NEPA-like acts reintroduce the concept with greater sensitivity. Under nuisance law, a use or a project is judged either in one's imagination (preliminary injunction) or after it is built and its impact on the surroundings is considered. If the adverse externalities are too great, the use or project is declared a nuisance and enjoined, forced to mitigate externalities, or forced to pay damages. The planning and zoning system, by contrast, is theoretically different. The plan (master plan or as represented by the zoning) is adopted first. Development is then placed in accordance with this comprehensive plan. If it does not fit the plan, it does not theoretically get built.

NEPA and NEPA-like state acts are like nuisance law in that the project is first imagined in a particular place and then its relation to the surroundings is judged. Of course, the judging is much more sensitive and, at least to date, the project cannot be stopped if the externalities are adverse. The only hope is that the project will not be built if the men proposing it are rational and, as government officials, will act only in the overall public interest.

The latter assumption, of course, is a large one. Almost all of the litigation to date has been over the fact that an EIS had not been pre-

261. See text following note 115 *supra*.

pared, was ignored, or was clearly inadequate. No case has yet clearly decided that where the EIS is adequate, is read, and shows adverse externalities, but the project proposer goes ahead anyway, the project can be enjoined. As agencies learn that they must prepare and read the EIS's, they will do so. But we do not know that they will therefore act as responsible men or that they will be forced by courts to so act. Prepared at enormous expense for each project, the EIS's may be just so much paper work.

Consider what could be done for master planning in this country if all the resources now being devoted to EIS's were devoted to planning. The resources for planning would, one might suspect, be increased tenfold. There would be money to do the environmental work and to develop plans which would be timely and well-considered. Projects could then be judged in relation to a good plan that had already comprehensively made all the environmental, social, and economic trade-offs. An EIS, beginning as it does with a particular project in relation to the whole world, practically requires consideration of the same things as a plan. The difference under an EIS system is that as the second and third projects come along, they, too, must be studied afresh. It is a ridiculous waste of resources.

At the time the California legislature was passing CEQA, it was also passing the strongest planning-regulation consistency laws in the country. In recent years, in unprecedented steps, the California legislature has required that every city and county, including chartered cities, adopt a general plan.²⁶² Several elements of these mandatory plans must be completed by a certain date,²⁶³ the date-setting also being unprecedented. Subdivision maps can be approved only if consistent with applicable general or specific plans.²⁶⁴ Zoning ordinances must be consistent with a general plan by a certain date.²⁶⁵ Such legislation is absolutely unrealistic.

If all the planners in America were enticed to California, good plans could not be produced as the legislature has directed. And, of course, all planners in America will not be attracted because no one has provided the tenfold increase in funding necessary to prepare these crash plans. So the scene was bad enough before *Friends*

262. CAL. GOV'T CODE §§ 65300, 65302, 65700 (West Supp. 1972).

263. For present provisions on local projects see *id.* §§ 65561(d), 65563-65564.

264. CAL. BUS. & PROF. CODE § 11526.1 (West Supp. 1972).

265. CAL. GOV'T CODE §65860(a) (West Supp. 1972).

imposed and CEQA, as amended, added the duty on planning agencies to prepare EIR's on all significant, locally-permitted private projects. Indeed, even the guidelines for all this planning are to come from essentially the same state agency working on the CEQA guidelines,²⁶⁶ an agency that traditionally has enjoyed a handful of planning positions. Thus the state-ordered planning is somewhat inadequate because both state and local planning agencies are busy drafting guidelines and preparing and reviewing EIR's.

Perhaps, however, with all this work emanating from CEQA and with all the planning and planning-regulation consistency law requirements, there is one bright note in this critique. These laws (and some others which would make the story too long) might be justified if they were known as the "Planners and Lawyers Unemployment Relief Acts of the 1970's."

The emphasis on the physical factor further points out the regressive nature of CEQA theory as an environmental management tool. Since its beginning, local planning has been trying to shed its dominant concern with the physical, so that planning would include social and economic considerations. CEQA, largely, puts us back with the physical.

Further, the EIS can be employed as just another stop in a long chain of required permits—grading, subdivision, sewer, zoning, building, occupancy, etc. This development would be counter to a growing movement to have a one-stop development permission system. Many bites at the apple waste resources and defeat expectations. Given their inadequate resources, even environmental groups might prefer to concentrate their opposition on one stage rather than many. Of course, if the EIS system is administered so that a favorable EIS makes all subsequent permits virtually automatic, it might accomplish much of what the one-stop service movement is seeking.

It is interesting to note that the most recent observable trend is to do just what the above suggests. Despite considerable federal and state legislation on air, water, and noise pollution, and the NEPA

266. The California Office of Planning and Research prepares guidelines under CEQA. CAL. PUB. RES. CODE § 21083 (West Supp. 1972). CEQA guidelines are *adopted* by the California Resources Agency. *Id.* § 21082. Most of the planning-related guidelines come from the California Council on Intergovernmental Relations which works so closely with the Planning and Research Office as to make them virtually indistinguishable. CAL. GOV'T CODE §§ 34211-34219 (West Supp. 1972).

and NEPA-like state laws, there is a perceived inadequacy that we have not yet put it all together. The proposed solution is the Land Use Policy and Planning Assistance Act,²⁶⁷ which is basically designed to invigorate state and local land-use control as the vehicle to put not only the environment together but also economic and social factors.

Despite the reader's conviction by this point that the author is an unreconstructed land-use control traditionalist, nothing could be further from the truth. The author has enough familiarity with the traditional land-use control system to regard it with contempt. The above comments are for those policymakers who regard things like comprehensive planning as important, and who should therefore be advised of the inconsistency of their actions in requiring both plans and EIS's.

I think general plans should be scrapped. In their place we need a highly computerized information system that produces utilizable information in a highly readable way that is made available to decision-makers so that they can make ad hoc decisions based on the best information available at the time.²⁶⁸ In a way, that is what an EIS is. But EIS's are not organized into any system. If we had a mechanism for putting all EIS's on a computer that could retrieve all their accumulated information, make it available for the next case, permit us to tell decision-makers what the future will look like given their alternative choices, and then let them make the decision fully informed—that would be such a system. Yet it appears no such system is developing, except, one would suppose, in the private planning firms with EIS consultants who reuse EIS boiler plate just as they reused master plan boiler plate.

If a philosopher-king had all the money that goes into master plans plus all the money going into EIS's, both of which have a half life of about ten minutes, what an information system we could have! If such a system were to develop out of the present planning-EIS controversy, the struggle would be worth it.

In a way, all CEQA does to the traditional system, both as to local public works and locally-permitted private projects, is to say "we

267. S. 268, 93d Cong., 1st Sess. (1973).

268. My position is summarized in Hagman, *Implementation of Land Use Planning in the Political Process*, LAND USE PLANNING 128 (T. Box ed. 1972), reproduced in part in D. HAGMAN, PUBLIC PLANNING AND CONTROL OF URBAN AND LAND DEVELOPMENT ch. 6 (1973).

really mean it.” We really mean that you should take environmental considerations into account, as you supposedly always have been required to do. All that CEQA adds is that local public works agencies will now prepare an EIR, and it will be reviewed by the planning agency that will also prepare its traditional report. All that CEQA adds to private projects is that the planning agency will prepare (or require the developer to prepare) and review an EIR in addition to the traditional documents. If that is all that has been accomplished, it would seem that a simple amendment to the planning and land-use control laws would have been a more appropriate approach.

That approach I call the “five little words approach.” It comes from a similar approach that I prefer for handling matters of regional concern. Rather than create the elaborate state or regional planning mechanism we now seem destined to create, I would prefer five words in all planning and land-use control legislation: “in accordance with regional considerations.” If that kind of language had been in planning and land-use control legislation all these years (and it has not), and if some environmental activists had persuaded a few courts to take heed (and they could have), we would not be entering the last half of the decade with our planning agencies and commissions still being managed by public officials who think the relevant public they serve ends at the boundary lines of the governments for which they work. To implement CEQA ideas, the five little words approach suggests amending the planning and land-use control laws to say, in effect, “pay more attention to the environment.”

B. *Some Easier Questions*

We might reflect on some rather obvious points to be made about NEPA-like state acts. By now, states should have the issues focused clearly as to whether these acts should include local governments and publicly-permitted private activities. The vagueness of the first generation statutes about these issues can no longer be justified on the grounds that the legislators wanted to do something good about the environment, or that deliberate vagueness is sometimes appropriate in new legislation in order to gain some experience. The earlier acts now look as if they just copied NEPA without any real thought as to what they were to accomplish.

In developing second generation acts, in light of the comments of the previous section, one might want to consider whether a balance in environmental, economic, and social dimensions is appropriate,

whether the acts should be modified to the extent they are being used in exclusionary roles, and whether the NEPA-like goals could better be accomplished by amending the planning and land-use control enabling legislation rather than having separate legislation.

There is a growing body of experience on the issue of who should prepare and review EIS's. Leaving that role generally to the development agencies seems untoward. Reports are likely to be more thoughtful if some general purpose agency, directed to broad environmental goals, is assigned the task with adequate staff and funds to prepare EIS's or at least to review them.

Those acts that require an EIS for a legislative proposal yet exclude an EIS for an environmental agency's regulatory action should be reviewed, particularly in light of the North Carolina study.²⁶⁹ The stop or slow-growth environmentalists are troubled about requiring regulatory actions to be subjected to EIS's. Where the regulatory agency is like the Army Corps of Engineers, which gives permits to discharge refuse (meaning any discharge in rivers), environmentalists might applaud the fact that the Corps has to prepare EIS's on permits,²⁷⁰ since discharge meanwhile would be delayed. Environmentalists might oppose extending the EIS requirement to agencies such as EPA, since their regulations move toward a cleaner environment.²⁷¹

Public participation in the EIS process appears to be increasingly recognized as desirable. This is the kind of matter on which one can have a particular position on Monday, Wednesday, and Friday and a different position on Tuesday, Thursday, and Saturday. My position on the first three days is that public participation is a good thing. My position on the next three days is that we should have sensibly bounded general purpose governments capable of making trade-offs, that these governments should be officered by persons subject to rigorous conflict-of-interest laws, that they should be elected under restrictive campaign contribution laws, and that these governments then should be allowed to govern. Public participation by special interest groups may merely lead to more fragmentation of governments, which is the curse of most geographical areas.

The definition of the size of projects that have a significant effect on the environment is an important matter. One should realize that

269. See notes 104-105 and accompanying text *supra*.

270. *Kalur v. Resor*, 335 F. Supp. 1 (D.D.C. 1971).

271. See *Anaconda Co. v. Ruckelshaus*, note 229 and accompanying text *supra*.

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if small developments are included, resources may not be available to conduct adequate reviews of important environment-befouling activities.

Some states incorporate NEPA or its guidelines. That might be considered. Alternatively, where states have strong NEPA-like state acts, the federal government might consider having its agencies comply with the state acts. Such a step would be somewhat similar to the approach of the Interstate Land Sales Full Disclosure Act, which does not apply in certain states that have equivalent or stricter legislation.²⁷²

Generally, the notion that the development agency or private developer should pay the cost of the EIR preparation by the environmental agencies seems desirable. Alternatively, the environmental agencies might be better funded with general funds. Preferred projects, such as low-income housing, should not be forced to absorb these costs, which can be considerable.

Whether or not agencies should be allowed to proceed if the report is adverse is an interesting problem. If they are allowed to proceed, EIS preparation may be a wasteful exercise. On the other hand, if the EIS covers only the physical environment or covers only a limited part of the rest of the environment, agencies should be allowed to proceed if the general public weal represented by economic or social considerations is overwhelming. If there is an adequate review process that assures that the agency is not identifying its weal as the public weal, an adverse environmental report should not by that conclusion alone force abandonment of the project.

POSTSCRIPT*

In connection with the earlier discussion on race and poverty, one should acknowledge that there are states which are both poor and

272. 15 U.S.C. § 1708 (Supp. 1973).

* Professor Hagman's postscript, added immediately prior to publication, summarizes recent activity relating to NEPA-like state laws.

Virginia, Connecticut, Minnesota, and Maryland have all enacted NEPA-like state acts. North Carolina extended its act's operation from 1973 to 1977. Revised guidelines for CEQA have been proposed by the Resources Agency of California. Arizona, Michigan, New York, Texas, and Vermont have applied NEPA-like concepts to some actions through policy statements by agencies or executive orders. The Council of State Governments has developed a model NEPA-like state law.

Cases decided in California, Washington, and New Mexico have made it clear that state courts are not going to emasculate the state statutes. State and local

environmentally degraded, so that it is possible to be both simultaneously. One must agree that the poor should not win every time and that it is possible to redistribute wealth and clean up the environment at the same time. But the former is difficult when there is a lack of will to do so. If there were poverty law firms these days with access to resources sufficient to compel redistribution of wealth either by confrontation with environmentalists or in other ways, environmental activism could then be more applauded. Balance is the goal. And environmentalists, as all activists, must curb their tendency to win battles in the name of a quality life when quality is defined in single-faceted terms.

As other states joined California in adopting NEPA-like state laws, it remained unclear whether the EIS system could be justified on a cost-benefit analysis basis. That is, while everyone can be for raising environmental consciousness, was the EIS system the way to do it? Was too much emphasis being given to the physical environment? Were the EIS's just busy work? Were they speaking meaningfully as they were ground out of suddenly formed consultant offices? If EIS's were speaking, was anyone listening?

The cost is considerable. A visiting lecturer in my urban planning class indicated that Orange County, California hired 15 persons to prepare and review EIR's since *Friends* made CEQA meaningful. The City of Los Angeles estimated that the EIR process would cost the city as much as \$865,000 in 1973 and proposed to charge fees ranging from \$30 to \$1,000 per application to administer the system with respect to private development. In Beverly Hills, California, a fully developed city of about 33,500 persons, veteran city councilmen claimed they were totally confused about the EIR requirement. Meanwhile, they were being asked to approve hiring three new clerks and three new associate planners to handle EIR's. They were told consultants were charging \$30 to \$50 per hour to prepare EIS's and that even routine reports were costing \$2,500. There was a backlog of 35 projects needing EIR's in Beverly Hills.

Was the cost worth it? Another visiting lecturer reported that he had suggested a delay in the approval of his client's project before the Los Angeles City Council because the council members had not seen

agencies, as was the case with federal agencies, have tried various strategies to avoid the state acts, but the agencies have not prevailed. Thus the statutes have been broadly interpreted and applied.

and did not have the city's EIR on the project before them during the hearing. The attorney feared the oversight would cause his client difficulty in subsequent litigation. But the president of the council told the attorneys that the report was accepted and to proceed.

It may be unfair to suggest that EIR's are not effective just because the final decision-makers do not read them. Perhaps they are read carefully by staff persons who are thus influenced in making their recommendations.

An attorney in private practice who was on retainer to several cities in California reported that most cities had an approved list of environmental consultants to which private developers were directed. He noted that only consultants who came up with favorable EIR's enjoyed much business.

This postscript also permits some further comment on the relation of traditional land-use controls to the EIR system. First, while CEQA has no such express requirement, the guidelines for CEQA define the term "project" to include the adoption of local general plans or elements thereof. The guidelines are legally correct. The adoption of a general plan or an element thereof clearly appears to be a discretionary, major action that could have a significant effect on the environment, though given the traditional disregard for master plans, the effect of a plan may be little more than theoretical. It is clear that plans in California are presently intended to be strong documents. Thus, while it may be untoward that a comprehensive plan, which is to balance socio-economic-physical matters, must itself dance to the unifacted tune of concern with the physical environment, not much more can be said in criticism that has not already been said. If society wishes to shift from an extreme of little attention to physical environmental matters to an overbearing attention, that is a decision society has power to make however ill-advised.

Secondly, a relation between general plans and EIR's is discussed in a new California guideline document explaining how general plans should be made. The document suggests how the matters to be contained in an EIR are to be applied with respect to general plan-making. If all of those matters are included in the planning process, the general plan can contain its own impact statement. No one can seriously object to a consideration of EIR's in connection with the planning process, for such matters have always been theoretically part of the process anyway. CEQA just says it again.

Lastly, the new California guidelines deal with the suggestion that

if environmental trade-offs are made in the general plan, there is no necessity of having another EIR for particular projects in conformance with the plan. The guidelines state, however, that this approach attributes greater foresight to the general plan than its nature and time-frame make possible. The guidelines continue with language that seems to limit the environmental review at the project level to the more specific, immediate, localized environment. The guidelines make the right choice.

It is not traditional to load all decision-making in the plan. Typically, all particular development permissions and projects are reviewed to determine their propriety; conformity with the plan is not the exclusive test. The proper weight to be given to the plan vis-à-vis immediate considerations is a difficult issue. The EIR process does not change the nature of the issue unless the EIR process on the specific project is so broad that it involves a de facto redoing of the plan for every project. The guidelines remove much of my earlier concern on the matter.