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# California's Environmental Quality Act— A Significant Effect Or Paper Pollution?

*The legislature's adoption of the Environmental Quality Act of 1970 created the necessary machinery whereby environmental protection shall be the guiding criterion in public decisions. This comment discusses the origins of the Act and its relation to the National Environmental Policy Act, the California Supreme Court's interpretation of the Act in Friends of Mammoth v. Board of Supervisors, and the recent amendments to the Act which have significantly expanded its scope. Finally, an analysis of several of the potential problems with the Act and recent legislative and judicial attempts at clarification is provided.*

Man no longer enjoys the margin of error that space, time and relative lack of power once provided for his ecological miscalculations. These mistakes may be cumulative—and irreversible.<sup>1</sup>

In 1970 the California Legislature enacted the Environmental Quality Act of 1970 (CEQA) which establishes a broad state policy aimed at protecting and enhancing the environmental quality of the state.<sup>2</sup> On September 21, 1972, in *Friends of Mammoth v. Board of Supervisors*<sup>3</sup> (hereinafter referred to as *Friends of Mammoth*) the California Supreme Court interpreted the provisions of CEQA to require that state and local governmental agencies file an environmental impact report for all projects, both public and *private*, which require a governmental permit, lease, or other entitlement for use, if such activities may have a significant effect on the environment. This decision, one of the first to construe the provisions of CEQA,<sup>4</sup> left local governmental agencies, lenders, and private developers struggling to determine the scope of its mandate. The court addressed several of their

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1. CALIFORNIA ASSEMBLY GENERAL RESEARCH COMMITTEE, REPORT OF ASSEMBLY SELECT COMMITTEE ON ENVIRONMENTAL QUALITY: ENVIRONMENTAL BILL OF RIGHTS 18 (1970) [hereinafter cited as ENVIRONMENTAL BILL OF RIGHTS]. This report proposed California's Environmental Quality Act of 1970.

2. CAL. PUB. RES. CODE §21000 *et seq.*, enacted, CAL. STATS. 1970, c. 1433, at 2780.

3. 8 Cal. 3d 1, 500 P.2d 1360, 104 Cal. Rptr. 16 (1972).

4. On September 12, 1972, the First District Court of Appeals construed the requirements of CEQA regarding the function of a local agency and the courts in reviewing an environmental impact report, and the content and sufficiency of an environmental impact report. *Environmental Defense Fund, Inc. v. Coastside County Water District*, 27 Cal. App. 3d 695, 104 Cal. Rptr. 197 (1972).

questions in its modified opinion of November 6, 1972.<sup>5</sup> However, the major attempt to clarify the supreme court's holding came with the legislature's enactment of Assembly Bill 889, which became effective on December 5, 1972.<sup>6</sup> Although Assembly Bill 889 significantly amended CEQA and resolved several of the questions raised by the *Friends of Mammoth* decision, a number of practical problems of transition to the new law, as well as some uncertainty over the implications of the *Friends of Mammoth* holding, Assembly Bill 889, and CEQA itself, still persist.

This comment will review the history and content of CEQA in comparison to the National Environmental Policy Act and the effect of the *Friends of Mammoth* decision on CEQA. Next, a summary of the provisions of Assembly Bill 889 will be provided, and finally Assembly Bill 889 and CEQA will be analyzed with respect to several potential problems facing those concerned with California's environmental policy.

## ENVIRONMENTAL QUALITY ACT OF 1970

### A. Policy Provisions

California's Environmental Quality Act of 1970 is essentially patterned after the National Environmental Policy Act (NEPA) passed by Congress in 1969.<sup>7</sup> The broad purpose of NEPA is to "declare a national policy which will encourage productive and enjoyable harmony between man and his environment . . . ."<sup>8</sup> To accomplish this purpose, NEPA mandates all federal agencies and officials to "develop methods and procedures . . . which will insure that . . . environmental amenities and values may be given appropriate consideration in decision making . . . ."<sup>9</sup> To insure implementation of this policy, Section 102 of NEPA "authorizes and directs that, to the fullest extent possible . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Chapter . . . ."<sup>10</sup> Thus it appears that

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5. *Friends of Mammoth v. Board of Supervisors, as modified on denial of rehearing*, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972).

6. CAL. STATS. 1972, c. 1154, at 2270.

7. 42 U.S.C. §4321 *et seq.* (1970). For a discussion of the application of the NEPA, see COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY—THE THIRD ANNUAL REPORT 221-67 (Aug. 1972) [hereinafter cited as COUNCIL ON ENVIRONMENTAL QUALITY]. See also Powell, *The Courts as Protectors of the Environment*, 47 L.A. BAR. BULL. 215 (1972); Note, *Retroactive Application of the National Environmental Policy Act of 1969*, 22 HAST. L.J. 805 (1971); Note, *A Panoramic View of the National Environmental Policy Act*, 16 How. L.J. 116 (1971).

8. 42 U.S.C. §4321 (1970).

9. 42 U.S.C. §4332(B) (1970).

10. 42 U.S.C. §4332 (1970).

federal agencies have little, if any, discretion regarding compliance with the substantive and procedural provisions imposed by NEPA.<sup>11</sup>

In comparison, CEQA as originally enacted in 1970 was a stripped-down version of NEPA. It contained broad statements concerning environmental policy objectives, but failed to specifically define and delineate the application of its provisions.<sup>12</sup> As the First District Court of Appeals stated in *Environmental Defense Fund, Inc. v. Coastside County Water District*, “[t]o be sure, the effectuating sections of the act are less heroic than is the declaration of policy . . . .”<sup>13</sup>

Basically, CEQA provides that all agencies of the state government which regulate the activities of private individuals, corporations, and public agencies that affect the quality of the environment shall regulate such activities so that major consideration is given to preventing environmental damage.<sup>14</sup> When proposing, planning, or taking action which has or could have a significant effect on the environment, governmental agencies at all levels must develop standards and procedures designed to insure the bona fide consideration<sup>15</sup> of (1) qualitative factors, (2) economic and technological factors, (3) long-term, as well as short-term, benefits and costs, and (4) alternatives to the proposed action.<sup>16</sup> These general and broad provisions form the basis of California’s environmental policy.

### B. Operative Provisions

Prior to the decision in *Friends of Mammoth* and the enactment of Assembly Bill 889, the operative language of CEQA required all state<sup>17</sup> and local<sup>18</sup> agencies to prepare an environmental impact report (EIR) for proposed projects which could have a significant effect on the environment.<sup>19</sup> This provision is similar to Section 102(C) of

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11. See Peterson, *An Analysis of Title I of the National Environmental Policy Act of 1969*, 1 ENV. L. REP. 50035, 50037 (1971).

12. CAL. PUB. RES. CODE §21000 *et seq.*, as enacted, CAL. STATS. 1970, c. 1433, at 2780.

13. 27 Cal. App. 3d 695, 701, 104 Cal. Rptr. 197, 200 (1972).

14. CAL. PUB. RES. CODE §21000(g). The court in *Friends of Mammoth* relied heavily on this intent section referring to “private individuals” in reaching its conclusion that private activities are included within the Act. CEQA, however, makes no mention of private individuals in its operative provisions.

15. CAL. PUB. RES. CODE §21001(f). See SACRAMENTO COUNTY CODE tit. 20, c. 20.01.

16. CAL. PUB. RES. CODE §21001(g).

17. CAL. PUB. RES. CODE §21100, as enacted, CAL. STATS. 1970, c. 1433, at 2781.

18. CAL. PUB. RES. CODE §21151, as enacted, CAL. STATS. 1970, c. 1433, at 2783.

19. CEQA provides that the impact report must set forth the following:

(a) The environmental impact of the proposed action.

NEPA which requires federal agencies to include an EIR "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment. . . ."20

Significantly, CEQA's requirement for preparation of an EIR was limited to cities and counties which did not have an officially adopted conservation element in their general plan pursuant to Section 65302 of the California Government Code.<sup>21</sup> Where such a conservation element was included in the general plan, the local agency was required only to make a finding that its intended project was in accord with such conservation element.<sup>22</sup> However, such local agencies were required to prepare EIR's on a project-by-project basis if they received state or federal funds for land acquisition or construction projects which may have a significant effect on the environment.<sup>23</sup>

### C. Administration and Interpretation of Statutes

CEQA, prior to the enactment of Assembly Bill 889, contained language similar to NEPA requiring interpretation and administration of statutes and regulations in accordance with environmental policy.<sup>24</sup> Section 21107 of CEQA required that state agencies review their present statutory authority, rules, and policies to determine any inconsistencies or deficiencies in these provisions which would hinder compliance with

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(b) Any adverse environmental effects which cannot be avoided if the proposal is implemented.

(c) Mitigation measures proposed to minimize the impact.

(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 if the proposed action should be implemented.

CAL. PUB. RES. CODE §21100, *as enacted*, CAL. STATS. 1970, c. 1433, at 2781. These elements are identical to those contained in the NEPA §4332(C) except for the requirement (c) of mitigation measures.

20. 42 U.S.C. §4332(C) (1970).

21. CAL. GOV'T CODE §65302 requires cities and counties to prepare a general plan which consists of a general statement of development policies, objectives, principles, standards, and proposals. Its purpose is to serve as a guide for the orderly physical growth and development and the preservation and conservation of open space land of the county or city and as a basis for the efficient expenditure of funds. CAL. GOV'T CODE 65400. The general plan must include elements concerning land-use, transportation circulation, housing, conservation, open space, noise, scenic highways, and seismic safety. CAL. GOV'T CODE §65302. It is in effect a constitution for all future development within the city or county. *O'Loane v. O'Rourke*, 23 Cal. App. 2d 774, 782, 42 Cal. Rptr. 283, 288 (1965). The conservation element of a general plan specifically covers the conservation, development, and utilization of natural resources including water, forests, soils, rivers, harbors, fisheries, wildlife, minerals, and other natural resources. CAL. GOV'T CODE §65302(a). See CONTINUING EDUCATION OF THE BAR, CALIFORNIA ZONING PRACTICE §2.21 (1969); Perry, *Local "General Plan" in California*, 9 SAN DIEGO L. REV. 1 (1971).

22. CAL. PUB. RES. CODE §21151, *as enacted*, CAL. STATS. 1970, c. 1433, at 2783.

23. CAL. PUB. RES. CODE §21150, *as enacted*, CAL. STATS. 1970, c. 1433, at 2783.

24. See text accompanying note 10 *supra*.

CEQA.<sup>25</sup> This section was repealed, however, by Assembly Bill 889.<sup>26</sup>

In contrast to CEQA, Section 102 of NEPA requires that its standards and policies be applied by federal agencies in their decision-making process unless compliance is impossible or expressly prohibited by the statute under which the agency operates.<sup>27</sup> Under this view, inconsistent agency regulations not required by the statute itself presumably would be swept away.<sup>28</sup> The importance of this provision is that it applies NEPA to situations in which there is no specific "project" under consideration, but merely agency "regulations." Agencies must review their policies and regulations to determine the need for changes to bring them into compliance with NEPA. For example, the Forest Service has modified its multiple-use planning framework for the National Forests guided by the policy of NEPA.<sup>29</sup> Thus agencies whose statutory mandates previously did not call for attention to environmental effects are now required to consider them. Similarly, agencies whose mandates were primarily directed to only certain facets of the environment now have a responsibility to incorporate the broad policy declared in NEPA.

#### D. *Development of Standards*

CEQA charged the Office of Planning and Research, together with the appropriate state, regional, and local agencies, with the task of developing objectives, criteria, and procedures for the preparation of environmental impact reports.<sup>30</sup> Similarly, NEPA created the Council on Environmental Quality whose main task is the study, appraisal, and evaluation of current and prospective environmental trends and their inter-relationship with present federal actions and programs as well as future legislation to promote the improvement of environmental quality.<sup>31</sup>

CEQA was clearly intended by the legislature to "develop an

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25. CAL. PUB. RES. CODE §21107, *repealed*, CAL. STATS. 1972, c. 1154, at 2275.

26. It is significant to note that A.B. 889 initially amended Section 21107 to require every *public agency* to review its statutory authority, rules, regulations, policies, and procedures to determine inconsistencies with the intent, policies, and procedures of CEQA. A.B. 889, 1972 Regular Session, *as introduced*, Mar. 13, 1972. This provision was deleted subsequent to the modified opinion in *Friends of Mammoth*. A.B. 889, 1972 Regular Session, *as amended*, Nov. 16, 1972.

27. 42 U.S.C. §4332 (1970). See 115 CONG. REC. 40418 (1969); Fisher, *Environmental Lawyer in the Lion's Mouth: Litigation Before and Against Administrative Agencies*, CALIFORNIA CONTINUING EDUCATION OF THE BAR, NATIONAL CONFERENCE ON ENVIRONMENTAL LAW—TRANSCRIPTS OF THE SPEECHES 63 (1971).

28. Fisher, *supra* note 27, at 93.

29. COUNCIL ON ENVIRONMENTAL QUALITY, *supra* note 7, at 227.

30. CAL. PUB. RES. CODE §21103, *repealed*, CAL. STATS. 1972, c. 1154, at 2275.

31. 42 U.S.C. §4344 (1970).

orderly process that prevents environmental damage, better identifies the true costs and consequences of . . . public and private actions, and prevents overcommitment of . . . limited resources."<sup>32</sup> However, due to CEQA's generality and lack of firm statutory guidance for the administration and enforcement of its provisions, the scope and effect of the Act was not clear. Unquestionably, there is a need for specific provisions in a statute of this nature because "[c]ourts do not have, and will not assume, authority to review agency decisions made within the outer limits of their statutory authorization . . . ."<sup>33</sup> As one commentator pointed out, it is doubtful California's Act offers the rich possibilities (for environmental lawyers) as does NEPA.<sup>34</sup>

#### THE FRIENDS OF MAMMOTH DECISION

Interpreting CEQA in *Friends of Mammoth*, the California Supreme Court held that state and local governmental agencies must prepare EIR's for private projects requiring a government permit or other approval if such private activities may have a significant effect on the environment.

In *Friends of Mammoth* a private corporation made application to the county planning commission for a conditional use permit for the construction of two multi-story condominiums. The permit was approved despite the lack of any EIR. Plaintiffs appealed the decision to the county board of supervisors, alleging that acute water and sewage problems would be created if the defendant were permitted to continue construction. The supervisors affirmed the planning commission's issuance of the conditional use and subsequent building permits. Plaintiffs then filed a petition for a writ of administrative mandate attacking the validity of the order granting the permits under CEQA.

The principal legal issue presented in the case was whether CEQA applied to private activities for which a permit or other entitlement for use is required. The dispute involved Section 21151 of the California Public Resources Code which required local governmental agencies having no conservation element in their general plan to make an EIR on any project they intended to carry out which might have a significant effect on the environment.

The court found a legislative intent to include private activities as well as governmental activities within the scope of the Act. In reach-

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32. ENVIRONMENTAL BILL OF RIGHTS, *supra* note 1, at 20.

33. Morris, *Environmental Statutes: The Need for Reviewable Standards*, 2 ENV. LAW 75, 81 (1971).

34. Fisher, *supra* note 27, at 112.

ing this conclusion, the court, in addition to relying upon specific terminology in CEQA,<sup>35</sup> relied extensively on the provisions in NEPA and its implementing guidelines.<sup>36</sup> Particular emphasis was given to the federal guidelines defining actions included under NEPA<sup>37</sup> because "the [California] Legislature obviously was aware of the federal definitions when CEQA was passed."<sup>38</sup>

In its decision the court significantly clarified the scope of CEQA's application. First, the defendant's contention that the issuance of a conditional use permit and a building permit were not "projects" within the meaning of Section 21151 of the Act was rejected. In so doing, the court relied on the wording of the federal act and regulations<sup>39</sup> and construed the word project to include the issuance of a lease, permit, license, certificate, or other entitlement for use.<sup>40</sup> Secondly, the court rejected the defendant's claim that since "project" is followed by the phrase "they intend to carry out," Section 21151 can only be construed as referring to "public works" projects to be carried out by the government. The court held that this phrase "mean[s] 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 [the] private activity."<sup>41</sup>

Finally, although not directly in issue in the case, the court addressed itself to the problem of what constitutes a "significant effect on the environment" as that term is used in Section 21100 of the Act. The court noted that since CEQA requires the broadest application possible, the term must not be used as a basis to excuse the making of impact reports. The court then defined the term to include "those activities which have any non-trivial effect on the environment."<sup>42</sup>

The *Friends of Mammoth* decision caused some degree of confusion and uncertainty for developers and lending institutions as well as local

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35. 8 Cal. 3d at 10-11, 500 P.2d at 1366, 104 Cal. Rptr. at 22. The court stated that the provisions of Section 21001(f), which require governmental agencies at all levels to develop standards and procedures necessary to protect environmental quality, necessarily include situations in which the state regulates private activity. In reaching this conclusion, the court relied on references in CEQA to "public decisions," "private interests," and the responsibility of every citizen to contribute to environmental preservation. CAL. PUB. RES. CODE §§21101(d), 21000(e), 21000(f).

36. 8 Cal. 3d at 14-15, 500 P.2d at 1369-70, 104 Cal. Rptr. at 25-26.

37. 35 FED. REG. 7390, 7391 (1970) (interim guidelines); 36 FED. REG. 7724, 7725 (1971) (final guidelines).

38. 8 Cal. 3d at 15, 500 P.2d at 1369, 104 Cal. Rptr. at 25.

39. 42 U.S.C. §4332(C) (1970); 35 FED. REG. 7390, 7391 (1970); 36 FED. REG. 7724, 7725 (1971).

40. 8 Cal. 3d at 16, 500 P.2d at 1370, 104 Cal. Rptr. at 26.

41. *Id.*

42. 8 Cal. 3d at 24 n.10, 500 P.2d at 1376 n.10, 104 Cal. Rptr. at 32 n.10.



governmental agencies.<sup>43</sup> Since CEQA had been applied only to public projects, local governments faced very real problems of transition to full implementation of the Act as interpreted in *Friends of Mammoth*.<sup>44</sup> Much speculation arose as to what private activities were to fall within the purview of CEQA (e.g., zoning changes, building permits, general plan amendments, subdivision maps), what standards were to be used to determine whether an activity has a non-trivial effect on the environment, and perhaps most important, what projects if any would be exempted from the holding.

The court in its modified opinion on denial of rehearing addressed several of these issues. First, the court attempted to clarify its definition of the "significant effect on the environment" provision. As stated previously, the original opinion had interpreted the phrase to include activities having a non-trivial effect on the environment. In the modified opinion the court deleted this much criticized language and stated that, although abuse of the significant effect requirement to avoid the application of CEQA will not be permitted, most private projects for which governmental approval is required will, in the absence of unusual circumstances, have little or no effect on the environment and may, therefore, be approved exactly as they were prior to the enactment of CEQA.<sup>45</sup> Furthermore, the court stated that the interpretation of the "significant effect" language of the Act "will thus be fleshed out by the normal process of case-by-case adjudication."<sup>46</sup> The apparent reason for the court's unwillingness to redefine the "significant effect" requirement in concrete terms was its realization that "[f]urther legislative or administrative guidance may be forthcoming on this point . . . ."<sup>47</sup>

Next, the court in its modified opinion held that it would apply the provisions of CEQA retroactively. That is, private projects for which governmental approval was secured prior to the court's initial ruling would not be exempt from the judicially interpreted provisions of CEQA. This position seems consistent with the statement of the court in the original opinion that its interpretation of CEQA has

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43. Statement by Paul E. Zigman, President, Environmental Science Associates, to the Senate Local Government Committee, Nov. 1972, at 1.

44. See Brief of the Attorney General of the State of California as Amicus Curiae in response to petition for rehearing at 1-3, *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972) [hereinafter cited as Brief Amicus Curiae of the Attorney General]. For example, 300 projects were halted in San Jose, California, due to the *Friends of Mammoth* decision. A number of local agencies, however, immediately established their own tentative guidelines for the preparation and processing of the EIR backlog. Zigman, *supra* note 43, at 3.

45. 8 Cal. 3d at 272, 502 P.2d at 1065, 104 Cal. Rptr. at 777.

46. *Id.* at 271, 502 P.2d at 1065, 104 Cal. Rptr. at 777.

47. *Id.*

been the law since it was enacted. Despite strong arguments urging only prospective application of the *Friends of Mammoth* decision (except where the issue of violation of CEQA was raised at the judicial level prior to the date of the decision),<sup>48</sup> the court stated that the appropriate statutes of limitation under local ordinances for seeking judicial review of the local agencies' approval would in most cases preclude attack in the courts, and that where a longer statute of limitations was provided in an ordinance, the doctrine of laches might provide the desired protection.<sup>49</sup>

Finally, the court refused to stay the effective date of its decision to permit the affected and unprepared governmental agencies to properly staff themselves, create the necessary administrative machinery, and arrange financing to do the job demanded by CEQA. The court gave two basic reasons for its unwillingness to grant a moratorium period. First, it felt that the majority of private projects covered by the decision would not have a significant effect on the environment and would not require impact reports. Thus it was apparently the court's opinion that the implementation of the *Friends of Mammoth* decision would not unduly burden public agencies. The court also reasoned that since public agencies had been applying the Act to public projects, they could draw on that experience in preparing guidelines for application to private projects. To the extent that some delays would result from the necessity of different guidelines for private projects, the court noted that "such delays are implicit in the Legislature's primary decision to require preparation of a written, detailed environmental impact report in precisely those cases."<sup>50</sup>

#### ASSEMBLY BILL 889

##### A. Legislative Compromise

The 1972 legislative session was in several respects a landmark year for environmental protection. The Legislative Birdwatchers, a coal-

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48. See Brief Amicus Curiae of the Attorney General, *supra* note 44, at 3.

49. 8 Cal. 3d at 272, 502 P.2d at 1066, 104 Cal. Rptr. at 778. In comparison, the federal case law dealing with the effective date of NEPA has taken several approaches including: (1) NEPA is not retroactive when applied to an ongoing project; (2) NEPA is applicable until the state of completion is reached when the costs of abandonment or alteration would clearly outweigh the benefits therefrom; (3) NEPA is applicable when departures from the original design are significant. See e.g., *Environmental Law Fund v. Volpe*, 340 F. Supp. 1328 (N.D. Cal. 1972); *Environmental Defense Fund v. Corp of Engineers*, 325 F. Supp. 728, 746 (E.D. Ark. 1971); *Pennsylvania Environmental Council v. Bartlett*, 454 F.2d 613 (3d Cir. 1971); see also ENVIRONMENTAL QUALITY—THE THIRD ANNUAL REPORT, *supra* note 7, at 232 & n. 67-68; Note, *Retroactive Application of the National Environmental Policy Act of 1969*, 22 HAST. L.J. 805 (1971).

50. 8 Cal. 3d at 273, 502 P.2d at 1066, 104 Cal. Rptr. at 778.

tion of environmental groups, said of the 1972 legislature, "After three years of operations, the Legislative Birdwatchers see a brighter environment resulting from the 1972 session."<sup>51</sup> Despite this optimism, however, the passage of environmental legislation was fraught with opposition and compromise. Assembly Bill 889 provides a case in point.

On March 13, 1972, prior to the ruling in *Friends of Mammoth*, Assemblyman John Knox had introduced Assembly Bill 889 which clearly was designed to bring private projects within the ambit of CEQA.<sup>52</sup> After the *Friends of Mammoth* decision, however, Assembly Bill 889 became a vehicle for the various interests involved to clarify the scope of the court's decision. The decision was vigorously criticized as judicial lawmaking run amuck,<sup>53</sup> and fears were expressed that the ruling would halt all building in the state. Contractors, lenders, and developers sought to delay the implementation of the decision as well as to validate completed and ongoing projects.<sup>54</sup> Governmental entities sought to clarify the *Friends of Mammoth* decision relating to approval of private projects and to obtain the needed time to establish guidelines under the court's decision. Environmentalists, not satisfied with the compromise provisions, attempted to preserve the broad mandate for environmental protection expressed by the supreme court's decision by advocating a rival measure, Assembly Bill 304.<sup>55</sup> They maintained that Assembly Bill 889 was not "tailored to save the environment or conservation ideals, [but rather it] has been tailored to be acceptable."<sup>56</sup>

The effect of these competing interests was extensive amendment of Assembly Bill 889. Legislators, conservationists, and building industry representatives hammered out compromise provisions which

51. Final Legislative Summary—1972 Session, compiled by Senate Majority Caucus Staff, Mervyn Dymally, Chairman, at 8.

52. A.B. 889, 1972 Regular Session, *as introduced*, Mar. 13, 1972.

53. CONTINUING EDUCATION OF THE BAR, PUBLIC CONTROL OF CALIFORNIA LAND DEVELOPMENT: SUPPLEMENT TO CALIFORNIA ZONING PRACTICE §3.81 (1973).

54. S.B. 1508, 1972 Regular Session, *as amended* Nov. 16, 1972. This bill provided that CEQA would not apply to private projects from the effective date of the Act until June 1, 1973. Furthermore, it provided that private projects carried out in whole or in part from Nov. 23, 1970, to the effective date of the Act were valid, notwithstanding a failure to comply with the provisions of CEQA.

55. A.B. 304, 1972 Regular Session, *as amended*, Nov. 29, 1972. Among other changes, this bill would have given local governmental agencies the right to adopt rules and regulations requiring the preparation of environmental impact reports in accordance with *stricter* standards than those provided for under CEQA.

56. Sacramento Bee, Nov. 30, 1972, at A 10, col. 3 (statement of Edwin L. Z'Berg). Furthermore, Assemblyman Paul Priolo, author of A.B. 304, charged that special interest lobbyists "are not just trying to smooth over the rough spots in the law created by the Court's decision. They are literally trying to roll back California's conservation laws to the don't-give-a-damn-about-the-environment point we were at several years ago." Assemblyman Paul Priolo, Press Release, Nov., 1972.

were not entirely satisfactory to either side. Opponents of the final version of Assembly Bill 889 felt that it would allow private developers to push through environmentally damaging projects. Assemblyman Knox, however, stated that the claim that "there would be a land rush is to say all local government in California is totally irresponsible."<sup>57</sup> Finally, in the late hours of the 1972 session, the final version of Assembly Bill 889 was passed. The attempt to keep the widest possible support and to accommodate the numerous interests resulted in a piece of legislation not altogether complete or cohesive.

### B. Private Projects

Perhaps the most important aspect of Assembly Bill 889 is that it codifies the ruling of the supreme court in *Friends of Mammoth* that CEQA applies to private as well as governmental projects. Section 21065(c) defines the term "project" to include "[a]ctivities involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies."<sup>58</sup>

Assembly Bill 889, however, provides that EIR's shall be required only for "discretionary projects," as opposed to "ministerial projects," proposed by or approved by public agencies. Discretionary projects include, but are not limited to, the enactment and amendment of zoning ordinances, the issuance of conditional use permits, and the approval of tentative subdivision maps.<sup>59</sup> NEPA makes no such distinction as to the application of its provisions. The distinction is a significant limitation of the *Friends of Mammoth* decision which apparently required an EIR prior to an agency's decision to grant building permits which are generally considered to be ministerial in nature.<sup>60</sup>

57. Sacramento Bee, Nov. 30, 1972, at A 10, col. 3 (statement of John Knox).

58. CAL. PUB. RES. CODE §21065(c), enacted, CAL. STATS. 1972, c. 1154, at 2271-72. Assemblyman Knox, the principal author of CEQA, has stated that in his opinion the environmental impact report requirement of CEQA has always extended to such private activities. JOURNAL OF THE CALIFORNIA ASSEMBLY 2020 (Reg. Sess. 1972).

59. CAL. PUB. RES. CODE §21080, enacted, CAL. STATS. 1972, c. 1154, at 2272.

60. See *Guidelines for Implementation of the California Environmental Quality Act of 1970*, CAL. ADMIN. CODE tit. 14, §15024, which defines "discretionary" and "ministerial" projects. Discretionary projects are defined as projects which require 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 in which the public agency merely has to determine whether there has been conformity with applicable statutes, ordinances, or regulations. Generally, if a property owner complies with applicable zoning ordinances he is entitled to a building permit. CONTINUING EDUCATION OF THE BAR, CALIFORNIA ZONING PRACTICE §5.62 (1969). The guidelines also recognize that in most instances the issuance of building permits (along with business licenses, final subdivision maps, and approval of individual utility service connections) will be ministerial in nature. CAL. ADMIN. CODE tit. 14, §15073. For an analysis of the applicability of CEQA to local agency formation commission (LAFCO) determinations, see Seneker, *The Legislative Response to Friends of Mammoth: Developers Chase the Will O' The Wisp*, 48 CAL. S.B.J. 127, 169 (1973).

Such a limitation seems desirable. An EIR would have little importance in the case of ministerial acts, such as granting building permits, since the agency has no discretion with regard to performing the act. Consequently, requiring the preparation of an EIR in a case where the agency's function is purely ministerial would place a heavy procedural burden in terms of cost and time on both the governmental agency and the party applying for the permit, with no corresponding benefit.

Prior to the approval of projects falling within the "discretionary" category, Assembly Bill 889 provides that *all* public agencies shall prepare, or cause to be prepared by contract, an EIR and certify the completion of that report if it is determined that the project may have a significant effect on the environment.<sup>61</sup> This provision is a significant amendment of CEQA because it extends the EIR requirement to all cities and counties notwithstanding the fact that they have a conservation element in their general plan. Previously, only those local agencies which did not have a conservation element as part of their general plan were required to prepare an EIR.<sup>62</sup>

It would seem that requiring all local agencies to submit EIR's removes a major problem area from CEQA. First, it encourages uniform consideration of the environmental factors and consequences of a proposed project. Previously, some local agencies were required to measure the environmental impact of a project against the requirements of CEQA, while others were allowed to use as a measure the standards of an officially adopted general plan. Secondly, while there has been extensive case law interpreting the requirement of both federal and state impact reports,<sup>63</sup> there appears to be no judicial decision interpreting the requirements of a local conservation element, its adequacy, or its relationship to an impact statement.

### C. Significant Effect on the Environment—Guidelines

As previously discussed, the court in *Friends of Mammoth* failed to specifically define what constitutes a significant effect on the environment.<sup>64</sup> The significant effect requirement is extremely important,

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61. CAL. PUB. RES. CODE §§21100, 21151, *as amended*, CAL. STATS. 1972, c. 1154, at 2274, 2276.

62. See text accompanying notes 21-22 *supra*. This provision was criticized by conservationists since it exempted a great number of cities and counties from the environmental impact report requirement.

63. See *e.g.*, *Hanly v. Mitchell*, 460 F.2d 640 (2d Cir. 1972); *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827 (D.C. Cir. 1972); *Environmental Defense Fund, Inc. v. Coastside County Water District*, 27 Cal. App. 3d 695, 104 Cal. Rptr. 197 (1972).

64. See text accompanying notes 40-42 *supra*.

however, because it is the initial determination that must be made for all projects under CEQA. The important contribution that Assembly Bill 889 makes in this area is that it specifies certain conditions which shall require a finding of significant effect on the environment. These conditions are: (1) 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; (2) possible effects of a project which are individually limited but cumulatively considerable; and (3) effects which will cause substantial adverse effects on human beings, either directly or indirectly.<sup>65</sup> Assembly Bill 889 also directed that guidelines for the implementation of the Act be developed by the Office of Planning and Research and certified and adopted by the Secretary of the Resources Agency.<sup>66</sup>

A potential problem is created by the fact that the guidelines adopted by the Secretary of the Resources Agency differ from Assembly Bill 889 in their definition of what constitutes a significant effect on the environment. The guidelines provide, "An iron-clad definition of significant effect is not possible because the significance of an activity may vary with the setting."<sup>67</sup> However, they go on to define significant effect as meaning a substantial adverse impact on the environment.<sup>68</sup> Thus according to the guidelines, an EIR need be prepared only where the agency determines that the project will have an *adverse* impact rather than merely a significant effect on the environment as required by Assembly Bill 889.

This provision of the guidelines has been severely criticized in several respects.<sup>69</sup> First, it limits the impact report requirement to cases in which the environmental consequences of a project are deemed "bad" or "undesirable" by the public agency involved. Beneficial projects would in effect be exempted. The fact that a project may have only beneficial effects, however, should not be determinative, since the alternative approaches to the project may be even more environmentally beneficial and involve fewer economic or technical problems.<sup>70</sup>

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65. CAL. PUB. RES. CODE §21083(a),(b),(c), enacted, CAL. STATS. 1972, c. 1154, at 2272-73.

66. CAL. PUB. RES. CODE §21083, enacted, CAL. STATS. 1972, c. 1154, at 2272. The guidelines for CEQA were adopted by the Secretary of the Resources Agency on 1973.

67. CAL. ADMIN. CODE tit. 14, §15081(a).

68. CAL. ADMIN. CODE tit. 14, §15040.

69. See Attorney General's Memorandum, Analysis of CEQA Guidelines Issued by the Resources Agency on Feb. 5, 1973 (Aug. 24, 1973).

70. See Comment, *The Compatibility of Economic and Environmental Objectives in Governmental Decision Making*, this volume at 92.

By comparison, the guidelines adopted pursuant to NEPA provide that "[p]roposed actions, the environmental impact of which is likely to be highly controversial, should be covered in all cases."<sup>71</sup> Indeed, a federal district court in *Goose Hollow Foothills League v. Romney*<sup>72</sup> held that an environmental impact statement must be prepared even where the agency believes that the environmental effects will be beneficial. The court expressly stated that even though a project may benefit rather than degrade the surrounding environment, this "does not mean that the project will not have a significant impact upon the quality of the . . . environment . . . ."<sup>73</sup>

Therefore, under the present CEQA guidelines a public agency conceivably could avoid the costly and time-consuming task of preparing an EIR by making an initial qualitative judgment that a project will be beneficial to the environment. It would seem, however, that in this respect the guidelines are contrary to the spirit of CEQA and the warning of the *Friends of Mammoth* decision that abuse of the significant effect requirement to avoid the application of CEQA will not be permitted. The mandate of CEQA requires not only protection of the environment but also affirmative enhancement of the environment. Such affirmative enhancement necessarily includes close scrutiny of beneficial projects to insure that such projects are the *most* desirable and beneficial to the environment.

#### D. Categorical Exemptions

Assembly Bill 889 requires the guidelines to include a list of classes of projects which have been determined not to have a significant effect on the environment and which shall be exempt from the provisions of CEQA.<sup>74</sup> In response to this mandate the Secretary of the Resources Agency included a list of nine classes of projects which he has found not to have a significant effect on the environment.<sup>75</sup>

The validity of the categorical exemptions provided by the guidelines is being challenged in *Center for Law in the Public Interest v. Livermore*.<sup>76</sup> The first objection is that in establishing the exemptions the Secretary of the Resources Agency has not made a proper finding as to why certain classes of projects are exempt. Petitioners contend

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71. 36 FED. REG. 7724 (1971).

72. 334 F. Supp. 877 (D. Ore. 1971).

73. *Id.* at 879.

74. CAL. PUB. RES. CODE §21084, enacted, CAL. STATS. 1972, c. 1154, at 2273.

75. CAL. ADMIN. CODE tit. 14, §15100 *et seq.*

76. California Supreme Court, *petition for writ of mandate*, Civil No. LA 30168 (filed July 29, 1973). The Supreme Court has denied the petition for mandate without opinion. Petitioners have since refiled the case in the Third District Court of Appeals.

that "[t]he lack of a contemporaneous written record regarding these exemptions makes it very difficult indeed 'to ascertain the principles relied upon' by the Secretary."<sup>77</sup> They further contend that "it would appear there was very little 'reasoned analysis' behind the Secretary's broad conclusion that none of the classes of projects exempted may have a significant effect on the environment."<sup>78</sup>

The second objection to the categorical exemptions is that they are overbroad. The major problem is in regard to the sections of the guidelines which exempt actions by regulatory agencies to assure the maintenance, restoration, enhancement, or protection of a natural resource or of the environment.<sup>79</sup> Petitioners claim these provisions could exempt all pesticide control programs, all zoning activities, and all other governmental programs supposedly designed to protect natural resources or the environment. This position is also taken by the Attorney General who has stated that these sections "appear to exempt virtually all actions taken by all regulatory agencies throughout the State."<sup>80</sup> Clearly, this is not authorized by CEQA.

In the Proposed Amendments to Guidelines for Implementation of the California Environmental Quality Act of 1970, two sections have been amended to provide a categorical exemption for the actions of regulatory agencies involving enhancement of natural resources or the environment "where the regulatory process involves detailed procedures for protection of the environment."<sup>81</sup> Also, the proposed amendment specifically excludes construction activities from these exemptions.

Apparently, these amendments to the guidelines are an attempt to limit the scope of the categorical exemptions relating to regulatory actions. However, they do not appear entirely satisfactory. Many regulatory actions, other than for construction, are still exempted from CEQA. Furthermore, merely requiring that the regulatory process involve detailed procedures for protection of the environment does not insure that such procedures will be consistent with the policy of CEQA.

#### *E. The Guidelines: Lead Agency and Other Provisions*

Assembly Bill 889 adds the concept of a "lead agency" to the

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77. Petitioner's Brief for Writ of Mandate at 27, *Center for Law in the Public Interest v. Livermore*, Civil No. LA 30168 (filed July 29, 1973).

78. *Id.* at 27-28.

79. CAL. ADMIN. CODE tit. 14, §§15107, 15108.

80. Attorney General's Memorandum, *supra* note 69, at 5.

81. Secretary for Resources, Proposed Amendments to Guidelines For Implementation of the California Environmental Quality Act of 1970, at 15 (Aug. 31, 1973).



provisions of CEQA. Lead agency is defined as the public agency which has the principal responsibility for carrying out or approving a project which may have a significant effect upon the environment.<sup>82</sup> The state guidelines adopted pursuant to Assembly Bill 889 state that "[w]here a project is to be carried out or approved by more than one public agency, only one EIR . . . shall be made, and it will be prepared by the Lead Agency."<sup>83</sup>

This addition to CEQA parallels NEPA's guidelines which provide:

The lead agency should prepare an environmental statement if it is reasonable to anticipate a cumulatively significant impact on the environment from Federal action. 'Lead agency' refers to the Federal agency which has primary authority for committing the Federal Government to a course of action with significant environmental impact. As necessary, the Council on Environmental Quality will assist in resolving questions of lead agency determination.<sup>84</sup>

The guidelines adopted pursuant to Assembly Bill 889 provide similar principles for the determination of the lead agency. Generally, the lead agency is the public agency which proposes to carry out the project,<sup>85</sup> or, in the case of private projects, the public agency with the greatest responsibility for supervising or approving the project as a whole.<sup>86</sup> If two public agencies equally fulfill these requirements, the guidelines provide that the agency which is to act first on the project in question shall be the lead agency.<sup>87</sup> In case of disputes, the Office of Planning and Research shall designate the lead agency.<sup>88</sup>

Also, the guidelines may provide that when an environmental impact statement has or will be prepared for the same project pursuant to NEPA, it may be submitted in lieu of an EIR required under CEQA.<sup>89</sup> Although the elements in an impact statement under NEPA differ slightly from those included in an impact report under CEQA,<sup>90</sup> the guidelines recognize this problem and provide that where an impact statement under NEPA is used in lieu of an impact report under

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82. CAL. PUB. RES. CODE §21067, enacted, CAL. STATS. 1972, c. 1154, at 2272.

83. CAL. ADMIN. CODE tit. 14, §15064.

84. 36 FED. REG. 7724-25 (1971). It should be noted that the lead agency concept is not mentioned in NEPA itself. Rather, it is a concept developed by the Council on Environmental Quality.

85. CAL. ADMIN. CODE tit. 14, §15065(a).

86. CAL. ADMIN. CODE tit. 14, §15065(b).

87. CAL. ADMIN. CODE tit. 14, §15065(c).

88. CAL. ADMIN. CODE tit. 14, §15065(d). For a criticism of the lead agency concept as applied to NEPA, see Humphreys, *NEPA and Multi-Agency Actions—Is the "Lead Agency" Concept Valid?*, 6 NAT. RES. LAW. 257 (1973).

89. CAL. PUB. RES. CODE §21083.5, enacted, CAL. STATS. 1972, c. 1154, at 2273.

90. See note 19 *supra*.

CEQA those elements missing in the NEPA report will have to be added.<sup>91</sup>

Assembly Bill 889 further requires that once a list of exempt classes of projects has been prepared and adopted pursuant to Section 21084, a public agency may at any time request the addition or deletion of a class of projects to the list.<sup>92</sup> Furthermore, the Office of Planning and Research is directed to periodically review the guidelines and recommend proposed changes or amendments.<sup>93</sup> The Secretary of the Resources Agency is authorized to provide for publication of a bulletin to give public notice of the guidelines and of the completion of environmental impact reports prepared pursuant to the Act.<sup>94</sup>

#### *F. Contents of EIR's and Procedures for Review*

As previously mentioned, Section 21100 of CEQA delineates those matters to which an environmental impact report must address itself.<sup>95</sup> Assembly Bill 889 adds to Section 21100 one significant inquiry which must be included in an EIR—inquiry into the growth-inducing impact of the proposed action.<sup>96</sup> The significance of this addition is that it appears to address questions other than the purely physical impact of a proposed project—questions such as the social and economic effects of the project.

With respect to the procedures to be followed by state and local agencies in preparing and reviewing EIR's, Assembly Bill 889 requires that prior to completing an EIR every local agency must consult with and obtain comments from any public agency which has jurisdiction with respect to the project. Local agencies may also consult with any person who has special expertise in the particular area of concern.<sup>97</sup>

Section 21160 authorizes public agencies to require any person applying for a lease, permit, license, or other entitlement for use to submit any data and information which will, first, enable the agency to determine whether the project may have a significant effect on the environ-

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91. CAL. ADMIN. CODE tit. 14, §15063.

92. CAL. PUB. RES. CODE §21086, *enacted*, CAL. STATS. 1972, c. 1154, at 2273.

93. CAL. PUB. RES. CODE §21087, *enacted*, CAL. STATS. 1972, c. 1154, at 2274.

94. CAL. PUB. RES. CODE §21088, *enacted*, CAL. STATS. 1972, c. 1154, at 2274.

As of this writing such a bulletin has not been published.

95. See note 19 *supra*.

96. The guidelines provide that included within this inquiry are the ways in which the proposed project could foster economic or population growth, either directly or indirectly in the surrounding environment. A major expansion of a waste treatment plant might, for example, allow for more construction in service areas and thus increase the population in that area. See CAL. ADMIN. CODE tit. 14, §15143(g).

97. CAL. PUB. RES. CODE §21104, *as amended*, CAL. STATS. 1972, c. 1154, at 2275.

ment and, secondly, if necessary, enable the agency to prepare an EIR.<sup>98</sup> A protective limitation on this authorization is that if any or all of the information required is a trade secret<sup>99</sup> it need not be included in the report or otherwise disclosed.<sup>100</sup>

Finally, Assembly Bill 889 and the guidelines provide that once an EIR has been prepared, no subsequent EIR is required unless: (1) substantial changes are contemplated in the project due to the involvement of new environmental impacts not considered in the original report;<sup>101</sup> or (2) substantial changes occur with respect to the circumstances under which the project is being undertaken.<sup>102</sup> What is "substantial" is not defined in the Act or the guidelines. The guidelines do, however, indicate that a change in the proposed location of the project would be substantial.

### G. Statute of Limitations

Assembly Bill 889 provides specified limitation periods for challenging acts or decisions of public agencies on grounds of noncompliance with the provisions of CEQA. Previously, no such periods of limitation were provided in CEQA. If an action alleges that a public agency is carrying out or has approved a project without determining whether the project may have a significant effect on the environment, Section 21167(a) provides that the challenging action or proceeding must be commenced within 180 days of the agency's decision or, if the project is undertaken without formal decision by the agency, then within 180 days from the date of commencement of the project.<sup>103</sup> If the allegation is that there has been an improper determination as to whether or not a project may have a significant effect on the environment, the challenging action or proceeding must be commenced within 30 days after filing of the notice of approval of the project

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98. CAL. PUB. RES. CODE §21160, *enacted*, CAL. STATS. 1972, c. 1154, at 2276-77.

99. Defined by Section 6254.7 of the California Public Records Act. CAL. GOV'T CODE §6250 *et seq.* The effect of this section is to include within the definition of trade secret certain information relating to air pollution data. Such trade secrets do not constitute public records. Section 6254.7 has been amended by S.B. 156 to include air pollution emission data, including data which constitutes a trade secret, within the definition of public records. Information constituting trade secrets used to calculate such emission data, however, are not public records. S.B. 156, CAL. STATS. 1973, c. 186.

100. CAL. PUB. RES. CODE §21160, *enacted*, CAL. STATS. 1972, c. 1154, at 2276-77.

101. CAL. PUB. RES. CODE §21166(a), *enacted*, CAL. STATS. 1972, c. 1154, at 2277; CAL. ADMIN. CODE tit. 14, §15067(a).

102. CAL. PUB. RES. CODE §21166(b), *enacted*, CAL. STATS. 1972, c. 1154, at 2277; CAL. ADMIN. CODE tit. 14, §15067(b).

103. CAL. PUB. RES. CODE §21167(a), *enacted*, CAL. STATS. 1972, c. 1154, at 2277-78.

with the county clerk or the Secretary of the Resources Agency.<sup>104</sup> Finally, if the allegation is that an EIR does not comply with the provisions of CEQA, then the challenging proceeding must be commenced within 30 days of the filing of the notice of approval of the project.<sup>105</sup>

As set forth above, it is apparent that Assembly Bill 889 does address itself to a number of significant areas of concern and confusion with regard to the application of CEQA as it was interpreted by the *Friends of Mammoth* decision. However, because of the urgent necessity of clarifying legislation and the legislature's attempt to reach a satisfactory compromise, Assembly Bill 889 has created some problems in the application and administration of CEQA.

#### POTENTIAL PROBLEM AREAS

##### A. *Substantive Rights*

A continuing question in relation to CEQA is whether it creates substantive as well as procedural rights. More specifically, does CEQA add to the statutory mandate of state and local agencies so as to require such agencies to deny or condition approval of a "project" based upon the likelihood that the project will have a deleterious effect on the environment?

Although Assembly Bill 889 does not specifically address itself to this issue, it does provide that an EIR is "an informational document which . . . shall be considered by every public agency prior to its approval or disapproval of a project."<sup>106</sup> The purpose of such reports is to provide public agencies with detailed information about the effect which a proposed project is likely to have on the environment, to list ways in which any adverse effects of such a project might be minimized, and to suggest alternatives to such a project.<sup>107</sup>

The provisions of Sections 21108 (relating to state agencies) and 21152 (relating to local agencies) indicate that public agencies have the power to approve projects notwithstanding a significant effect on the environment. They provide for a notice of determination to be filed for projects subject to CEQA which a public agency approves or determines to carry out. This notice is filed after a final decision is made on a project. Furthermore, those sections state that "such notice shall indicate whether the project *will*, or *will not*, have a sig-

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104. CAL. PUB. RES. CODE §21167(b), *enacted*, CAL. STATS. 1972, c. 1154, at 2278.

105. CAL. PUB. RES. CODE §21167(c), *enacted*, CAL. STATS. 1972, c. 1154, at 2278.

106. A.B. 889, CAL. STATS. 1972, c. 1154, §1, at 2271.

107. *Id.*

nificant effect on the environment . . . .”<sup>108</sup> Thus apparently a project may have a significant effect on the environment and still be approved by the public agency.

The guidelines prepared by the Secretary of Resources also address this question. They provide, “[N]or 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.”<sup>109</sup> Furthermore, they state, “Attention should be paid to alternatives capable of substantially reducing or eliminating any environmentally adverse impacts . . . .”<sup>110</sup>

Similarly, in the *Friends of Mammoth* decision the court stated that the environmental impact report will provide input “in the ultimate governmental decision based, *in part*, on that report.”<sup>111</sup> It would seem that such language in the Act, the guidelines, and the *Friends of Mammoth* decision indicates that an agency can approve a project notwithstanding an adverse environmental impact. If so, it is not clear under what circumstances an agency may exercise this authority.

It could be argued that CEQA does in effect create substantive rights through the imposition of numerous procedural safeguards. In this regard, the court in *Friends of Mammoth* did allude to the extent which environmental considerations should enter into an agency’s decision-making process. The court stated, “Obviously if the adverse consequences to the environment can be mitigated, or if feasible alternatives are available, the proposed activity, such as the issuance of a permit, should not be approved.”<sup>112</sup> Furthermore, the court warned,

In making these determinations [as to mitigation and alternatives], concrete concepts, not mere aphorisms or generalities, must be considered . . . .

The report, therefore, is to contain substantially greater analysis of the effect of the proposed activity on the environment and the possible mitigation devices and alternatives than can be achieved

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108. CAL. PUB. RES. CODE §§21108, 21152, enacted, CAL. STATS. 1972, c. 1154, at 2275-76 (emphasis added).

109. CAL. ADMIN. CODE tit. 14, §15012. This provision of the guidelines is currently being challenged. See note 76 *supra*.

The proposed amendments to the guidelines delete the language in Section 15012 relating to retention of existing authority by public agencies. They add the following language: “While CEQA requires that major consideration be given to preventing environmental damage, public agencies must also weigh other public objectives, including economic and social factors, in determining whether and how a project should be approved. Economic information may be included in an EIR or may be presented in whatever form the agency desires.” Proposed Amendments to Guidelines, *supra* note 81, at 1.

110. CAL. ADMIN. CODE tit. 14, §15143(d).

111. 8 Cal. 3d at 16 n.8, 500 P.2d at 1371 n.8, 104 Cal. Rptr. at 27 n.8 (emphasis added).

112. *Id.*

simply through testimony followed by a naked conclusion that the environment will not be harmed by the project.<sup>113</sup>

Several federal cases interpreting NEPA provide further guidance on this issue. In *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission*<sup>114</sup> the court stated,

What possible purpose could there be in requiring the 'detailed statement' . . . if the boards are free to ignore entirely the contents of the statement? NEPA was meant to do more than regulate the flow of papers in the federal bureaucracy.<sup>115</sup>

Furthermore, a federal district court has stated,

If the Act is seen as requiring only full disclosure, it will simply become a minor nuisance for agencies, imposing one more obligation of paperwork before they can get on with the projects they intend to build.<sup>116</sup>

Perhaps the most significant federal decision in this area is *Environmental Defense Fund v. Corps of Engineers*.<sup>117</sup> In that case the eighth circuit held that NEPA does create judicially enforceable substantive rights by which an agency's decision may be reviewed to determine if it is substantially in compliance with the policy of NEPA. Circuit Judge Matthes indicated,

The language of NEPA, as well as its legislative history, make it clear that the Act is more than an environmental full-disclosure law. NEPA was intended to effect substantive changes in decision making . . . [and] to require agencies to consider and give effect to the environmental goals set forth in the Act, not just to fill government archives.<sup>118</sup>

Although there is conflict among the cases on this issue, recognition of enforceable substantive rights in NEPA seems to represent a significant trend among the federal courts. Applying this reasoning to the EIR process under CEQA could potentially mean the invalidation of projects where the EIR discloses adverse effects that could be mitigated or avoided but the public agency fails to require mitigation or the use of feasible alternatives.

This precise question was raised on appeal to the First District Court of Appeal in the case of *Burger v. County of Mendocino*.<sup>119</sup> In

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113. *Id.*

114. 449 F.2d 1109 (D.C. Cir. 1971).

115. *Id.* at 1117.

116. *Committee to Stop Route 7 v. Volpe*, 346 F. Supp. 731, 738 (D. Conn. 1972).

117. 470 F.2d 289 (8th Cir. 1972).

118. *Id.* at 297-98.

119. Superior Court No. C33238 (Mendocino Super. Ct., filed Sept. 29, 1972), *appeal docketed*, 1 Civil 32455, Dec. 21, 1972. The case was remanded to the Superior Court on procedural grounds without a consideration of this issue by the First District Court.

that case the real party in interest proposed to build an 80-unit motel, bar, and restaurant on a 12-acre site. The county granted a building permit for the project, and the action was challenged by petitioner alleging that the project would require the preparation of an EIR. Pursuant to the superior court ruling that an EIR was necessary, an impact statement was prepared and submitted to the respondent county. The report recommended that an alternative project be approved, that further studies should be conducted to determine the feasibility of a waste disposal system, and that there were several other unanswered questions which should prevent the approval of the original project. Despite this adverse impact, the county reaffirmed its approval of the project. In an amicus curiae brief in support of the petitioner, the Attorney General contended that in light of the language in the *Friends of Mammoth* decision the action of the county in reaffirming the project without requiring mitigating alternatives must be set aside as an abuse of discretion.<sup>120</sup>

Given the supreme court's apparent attitude regarding the imposition of mitigating conditions or the use of feasible alternatives, and the failure of CEQA and its implementing guidelines to adequately address this problem, it would seem that clarifying legislation is necessary. One attempt at such clarification is Senate Bill 1051 which contains two significant provisions. First, it would amend Section 21001 (the policy statement of CEQA) to provide in part that "it is the policy of the state to . . . [e]nsure that the long-term protection of the environment shall be a *principal* guiding criterion in public decisions."<sup>121</sup> This language is somewhat less emphatic than the present statement of policy in CEQA which makes environmental protection *the* guiding criterion in public decisions. Secondly, Senate Bill 1051, in proposing the addition of Section 21091 to CEQA, expressly states that no provision of CEQA shall be construed to require the approval or disapproval by a public agency of a project solely on the basis of information contained in an EIR.<sup>122</sup> Such language would seem to settle the issue of whether an agency may approve a project even though the EIR indicates a significant adverse effect on the environment. At present, however, it does not seem likely that Senate Bill 1051 will be enacted into law due to opposition by environmental groups.

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120. Brief of the State of California as Amicus Curiae in Support of Petitioner at 19, *Burger v. County of Mendocino*, 1 Civil 32455, Dec. 27, 1972.

121. S.B. 1051, 1973-74 Regular Session, *introduced*, Apr. 26, 1973, by Senator Bradley, *as amended*, June 11, 1973.

122. *Id.*

Resolution of this issue by the legislature may prove difficult due to the many diverse interests which are involved. Perhaps the initial clarification, like the *Friends of Mammoth* decision, must come from the courts. In any case, a balance must be achieved between the fundamental interest of the state in environmental protection and the reality and necessity of development in a technological and ever-expanding society. It would seem, however, that such a balance is provided for under the existing law. Not only must agencies consider the environmental impact of a proposed project as well as alternatives to reduce adverse impacts, but economic and technical factors must also be considered. Additionally, the sponsor's justification for the proposed project is considered. By allowing agencies to approve projects notwithstanding a significant adverse impact, and without imposing mitigation measures or alternatives, the environmental policy of the state would amount to little more than mere verbage.<sup>123</sup>

### B. Preparation of the EIR

Prior to the enactment of Assembly Bill 889, CEQA provided that the responsible local agency was to prepare the EIR.<sup>124</sup> The responsibility for preparation rested solely on the governmental level since only governmental activities were subjected to the provisions of CEQA. However, since the *Friends of Mammoth* decision applied CEQA to private projects, there is a question as to what extent the duty to prepare the report and the costs of preparation may be delegated to the private developer or proponent of the project.

Sections 21100 and 21151, as amended by Assembly Bill 889, make it clear that the public agency itself *may* prepare an EIR or may cause one to be prepared by contract.<sup>125</sup> Also, Section 21089 provides that the public agency may charge and collect a reasonable fee from the proponent of a project in order to recover the estimated costs incurred in preparing an EIR.<sup>126</sup>

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123. An alternative to the substantive rights theory was proposed by the Lawyers Club of Los Angeles County at the 1973 Conference of Delegates of the California State Bar. This approach would include within the statutory definition of nuisance anything which constitutes pollution or impairment or destruction of the natural resources of the state. Furthermore, it would create a rebuttable presumption that violations of environmental statutes, such as CEQA, constitute a nuisance. STATE BAR OF CALIFORNIA, 1973 CONFERENCE RESOLUTION 9-7. Apparently, under this theory, an agency's approval of an environmentally damaging project could be invalidated on the grounds that it constitutes a public nuisance. The desirability of this approach is questionable because it would create great uncertainty with respect to all governmental decisions which could affect the environment.

124. CAL. PUB. RES. CODE §21150, *enacted*, CAL. STATS. 1970, c. 1433, at 2782.

125. CAL. PUB. RES. CODE §§21100, 21151, *as amended*, CAL. STATS. 1972, c. 1154, at 2274, 2276.

126. CAL. PUB. RES. CODE §21089, *enacted*, CAL. STATS. 1972, c. 1154, at 2274.



These provisions raise several issues. First, do Sections 21100 and 21151 authorize a public agency to contract with the proponent of a project to prepare the required EIR? With regard to NEPA, a federal case has held that the responsible agency itself must prepare the impact statement.<sup>127</sup> The court stated,

The primary and nondelegable responsibility for fulfilling that function lies with the [agency] . . . .

If this course of action . . . were not followed, alternatives might be lost as the applicant's statement tended to produce a *status quo* syndrome.<sup>128</sup>

Furthermore, CEQA's guidelines authorize nongovernmental persons to submit a draft EIR, but the responsible agency must examine this draft and the information contained therein to assure its accuracy and objectivity and must amend the draft if necessary. Therefore, it appears that the task of preparing an EIR cannot be completely delegated to the proponent of the project under consideration.<sup>129</sup>

Further clarification on this issue is being sought in *Center for Law in the Public Interest v. Livermore*.<sup>130</sup> Petitioners contend that Section 15085(a) of the guidelines, relating to the public agency's responsibility where a draft EIR is prepared by the applicant, is invalid. Petitioners argue that Section 15085(a) would allow the agency to reach the "naked conclusion" that a draft EIR is "accurate and objective" without developing a written record as to how that conclusion is reached.<sup>131</sup> While the guidelines state that the final EIR must reflect the independent judgment of the responsible agency,<sup>132</sup> there is no corresponding provision with regard to draft EIR's. Since the material contained in the draft impact report may provide important resource material for the final EIR, the public agency should make its own independent analysis and judgment of the applicant's draft EIR.

Another alternative to preparing the report is that public agencies could contract with independent environmental consultants. This approach also has some drawbacks. From an economic standpoint, the proponent of the project may have to bear substantial costs for the preparation of the EIR.<sup>133</sup> Furthermore, a conflict may arise in the

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127. *Green County Planning Bd. v. Federal Power Commission*, 455 F.2d 412 (2d Cir. 1972).

128. *Id.* at 420-21.

129. See Kane, *Friends of Mammoth: The Expanding Scope of Environmental Law in California*, 48 L.A. BAR BULL. 81, 105 (1973); Seneker, *supra* note 60, at 176.

130. Civil No. LA 30168 (filed July 29, 1973). See note 76 *supra*.

131. Petitioners Brief for Writ of Mandate at 29, *Center for Law in the Public Interest v. Livermore*, Civil No. LA 30168, July 30, 1973.

132. CAL. ADMIN. CODE tit. 14, §15085(a).

133. The Department of Water Resources has prepared an EIR cost guideline

situation where the public agency contracts with an environmental consultant to prepare an EIR. The preparation of an EIR requires close contact and cooperation between the environmental consultant and the developer. If this cooperation cannot be achieved because the particular consulting firm retained by the public agency is not acceptable to the developer, the preparation of the EIR may be substantially delayed or may not present a true picture of the particular project in question. Similarly, since the environmental consultant is essentially serving two "masters" a conflict of loyalty may result. Therefore, it would seem desirable where the public agency contracts with an environmental consultant to prepare the report that the private developer be included in this decision-making process.

Closely related to the issue of who must prepare the impact report under CEQA is the problem of licensing environmental consultants. The expanding application of CEQA has greatly increased the demand for qualified environmental consultants to advise and in many cases actually prepare EIR's for private developers and public agencies. Presently, however, there are no licensing requirements imposed upon environmental consultants to insure that they are qualified to adequately assess the environmental implications of proposed projects. Environmental planning calls for broad interdisciplinary expertise because of the complex social, physical, and ecological aspects of the environment. Thus a consultant firm must have expertise in a wide range of technical areas, such as ecology, forestry, land use planning, and water resources to name just a few. Because of this need for diversity, however, it is difficult to set forth general yet meaningful and effective standards for licensing environmental consultants. Preparing an EIR requires, as a minimum, expertise in the fields of local and regional planning, engineering, ecology and ecosystems, and economic analysis.

Since the content of an EIR may determine the fate of a proposed project, and indeed the future of the environment, it is essential that they are prepared by qualified personnel. The implementation of a licensing procedure for environmental consultants would help to insure this necessary level of expertise.

### *C. Regional Considerations—Constitutional Mandate*

Both Assembly Bill 889 and the guidelines are somewhat vague in terms of defining what consideration a local agency must give to

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which suggests an initial fee for the preparation of an EIR in relation to the estimated capital cost of the proposed project.

the possible adverse effects of a project on areas outside its jurisdictional boundaries. The guidelines provide that an EIR must describe the environmental setting of a project from both local and regional perspectives.<sup>134</sup> Furthermore, they instruct that “[k]nowledge of the regional setting is critical to the assessment of environmental impacts.”<sup>135</sup> These provisions, however, do not mandate a city, for example, to consider the impact of a project on the environment of a neighboring city. Thus a project which is beneficial within the boundaries of one agency may be approved notwithstanding possible adverse impacts on adjacent areas.

It could be argued, however, that restricting the consideration of the environmental effects of a proposed project to the boundaries of the particular agency (*i.e.*, the city or county) is an unconstitutional denial of due process. In *Scott v. City of Indian Wells*<sup>136</sup> the plaintiffs filed a class action seeking a declaratory judgment voiding the city's grant of a conditional use permit to construct a large planned development on land lying just within the city limits. Plaintiffs owned neighboring land situated just outside the city limits. Plaintiffs were not given notice of the hearing before the planning commission to consider the granting of a conditional use permit to construct a development consisting of two golf courses, tennis courts, clubhouses, 675 condominiums, and 90 individual lots.

The California Supreme Court held unanimously that the plaintiffs had standing to contest a municipality's zoning even though they are not residents of the municipality<sup>137</sup> and that the due process clause of the fourteenth amendment requires that non-city residents be given notice and an opportunity to be heard regarding the proposed development with respect to its effect on all neighboring property owners.<sup>138</sup>

Although the *Scott* case dealt primarily with a municipal zoning ordinance, the language of the case would seem equally applicable to the consideration of environmental impact reports by local public agencies. The court stated,

In today's sprawling metropolitan complexes, however, municipal boundary lines rarely indicate where urban development ceases

. . . .

To hold, under these circumstances, that defendant city may zone the land within its border without any concern for adjacent landowners would indeed “make a fetish out of invisible municipal

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134. CAL. ADMIN. CODE tit. 14, §15142.

135. *Id.*

136. 6 Cal. 3d 541, 492 P.2d 1137, 99 Cal. Rptr. 745 (1972).

137. *Id.* at 549, 492 P.2d at 1141-42, 99 Cal. Rptr. at 749-50.

138. *Id.*

boundary lines and a mockery of the principles of zoning.”  
“[C]ommon sense and wise public policy . . . require an opportunity for property owners to be heard before ordinances which substantially affect their property rights are adopted. . . .”<sup>139</sup>

Furthermore, the court imposed a duty on the city to consider the proposed development with respect to its effect on *all* neighboring property owners.<sup>140</sup>

An agency's action in approving or denying a proposed project based on an EIR would clearly affect substantial property interests of those situated outside the agency's physical boundaries. Indeed, the construction project in *Scott* would under present law be subject to the EIR requirement of CEQA. Therefore, an argument could be made that limiting an EIR's consideration of the impact of a project to the physical boundaries of an agency without hearing and considering the opinions of those who will be affected but who are outside the physical jurisdiction of the particular agency is a violation of the due process clause of the fourteenth amendment.

#### D. *The Guidelines—Negative Declarations*

As previously discussed, Assembly Bill 889 granted the Secretary of the Resources Agency together with the Office of Planning and Research broad discretion in developing objectives and criteria for the implementation of CEQA. Whenever an administrative agency is delegated such authority, the question arises as to whether the agency has exceeded its statutory authority in its attempt to implement the underlying statute. The guidelines adopted pursuant to CEQA pose some problems in this respect.<sup>141</sup>

The guidelines provide for the preparation of a “negative declaration” for projects which would ordinarily be expected to have a significant effect on the environment but which the agency finds will have no significant effect due to the circumstances of the particular project.<sup>142</sup> This procedure, which is not specifically authorized by CEQA, weeds out projects where an initial study by the public agency determines that the full EIR procedure is not warranted.

The guidelines, however, state that the negative declaration should not exceed one page in length<sup>143</sup> and should contain a description

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139. *Id.* at 548, 492 P.2d at 1141, 99 Cal. Rptr. at 749, *citing* Kissinger v. City of Los Angeles, 161 Cal. App. 2d 454, 464, 327 P.2d 10, 17 (1958).

140. 6 Cal. 3d at 549, 492 P.2d at 1142, 99 Cal. Rptr. at 750.

141. See text accompanying notes 67-81 *supra*.

142. CAL. ADMIN. CODE tit. 14, §15083.

143. CAL. ADMIN. CODE tit. 14, §15083(b).

of the project and a finding that the project will not have a significant effect on the environment.<sup>144</sup> This provision appears to be totally inconsistent with the spirit of CEQA. The purpose of CEQA is to provide full disclosure and detailed information about the effect which a proposed project is likely to have on the environment. Limiting the content of a negative declaration by sanctioning an arbitrary limit on its length does not seem to stimulate the free flow of information about a project.

Furthermore, such a limitation on the negative declaration would seem to invite environmental mistakes. That is, an erroneous initial study by a public agency may be totally overlooked merely because the negative declaration did not contain an adequate record of why the determination was made. With respect to NEPA the federal courts have sanctioned the negative declaration procedure but with the warning that perfunctory negative declarations should be avoided. A reviewable, even if not lengthy, record to substantiate the decision is required under the NEPA.<sup>145</sup>

Therefore, although the guidelines do not *require* that a negative declaration be limited to one page, they do sanction such a conclusionary report. Similarly, the proposed amendments to the guidelines include the same recommendation on length but require that the negative declaration contain a "brief statement of reasons to support the findings."<sup>146</sup> The emphasis, however, is still on conclusions. Although a negative declaration need not be as detailed in its analysis as an impact report, it would seem desirable that the negative declaration contain a substantially greater analysis of the environmental impact of a project than is presently required.

#### CONCLUSION

In the *Friends of Mammoth* decision, the California Supreme Court stated with respect to the CEQA:

In an era of commercial and industrial expansion in which the environment has been repeatedly violated by those who are oblivious to the ecological well-being of society, the significance of this legislative act cannot be understated.<sup>147</sup>

This comment has attempted to analyze California's Environmental Quality Act of 1970 in light of the recent legislative and judicial

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144. CAL. ADMIN. CODE tit. 14, §15083(a).

145. *Hanly v. Mitchell*, 460 F.2d 640 (2d Cir. 1972).

146. Proposed Amendments to Guidelines, *supra* note 81, at 10.

147. 8 Cal. 3d at 8, 500 P.2d at 1365, 104 Cal. Rptr. at 21.

attempts to assure that important environmental purposes are "not lost or misdirected in the vast hallways of . . . bureaucracy."<sup>148</sup>

Assembly Bill 889 has succeeded in significantly expanding the scope and effectiveness of CEQA. Private projects have been brought within the scope of the CEQA, and greater guidance has been afforded local and state agencies in implementing its provisions. There is, however, still further need of legislative and administrative clarification in the areas of a local agency's power to approve projects which may have a significant effect on the environment without requiring mitigation or the use of feasible alternatives, and discrepancies between the provisions of CEQA and its implementing guidelines.

Concededly, the problems discussed herein are not exhaustive; however, they are indicative of the types of problems and issues which face public agencies, developers, environmentalists, and ultimately the courts and legislature in the area of environmental protection in California. To the extent that the solutions to these problems and others like them can be achieved, the Environmental Quality Act of 1970 will truly have a significant effect in protecting and enhancing the quality of the human environment.

*Stephen H. Johanson*

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148. *Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971).