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# The Application of Emergency Exemptions Under CEQA: Loopholes in Need of Amendment?

Occasionally it becomes necessary to waive certain environmental regulations in an emergency situation. Such regulations, however, were not meant to be waived when serious environmental and economic destruction might occur. I do not believe that current efforts to stop the white bass from entering the Delta and destroying our fisheries are sufficient. I hope I'm proven wrong.<sup>1</sup>

The overriding goal of the California Environmental Quality Act (CEQA)<sup>2</sup> is to create and maintain conditions under which man and nature can exist in productive harmony.<sup>3</sup> In enacting CEQA, the California Legislature declared a policy of the state to be the development of a high-quality environment that fulfills the social and economic requirements of present and future generations.<sup>4</sup> To accomplish this laudable undertaking, CEQA requires that “. . . all agencies of the state government which regulate activities . . . which are found to affect the quality of the environment, *shall* regulate such activities so that *major consideration* is given to preventing environmental damage, while providing a decent home and satisfying living environment for every Californian.”<sup>5</sup> When projects or activities are evaluated to determine the effect on the environment, CEQA requires that both long-term and short-term benefits and costs be considered.<sup>6</sup> In certain instances, these requirements prove to be of great importance to the protection of the environment while inordinately vexatious in application.

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1. Assemblyman Phillip Isenberg, Pumping Tulare Lake Water To The Delta, A Tragedy In The Making, (Oct. 26, 1983) (copy on file at the *Pacific Law Journal*).

2. California Environmental Quality Act, CAL. PUB. RES. CODE §§21000-21176 [hereinafter referred to as CEQA]. CEQA was modeled after the federal environmental protection plan, the National Environmental Policy Act, 42 U.S.C. §§4321-4370 [hereinafter referred to as NEPA]. The impetus for CEQA was provided by a 1970 report, prepared by the California Assembly General Research Committee. Report of Assembly Select Committee On Environmental Quality, Environmental Bill of Rights (1970). The report stated that the purpose of the proposed CEQA would be to require all state and local agencies to consider the impact of their activities on the environment. *Id.* at 7. CEQA was signed into law on September 18, 1970.

3. CAL. PUB. RES. CODE §21001(e).

4. *Id.* §21001(a), (e).

5. *Id.* §21000(g) (emphasis added).

6. *Id.* §21001(g).

The provisions of CEQA, the State CEQA Guidelines,<sup>7</sup> and judicial decisions demonstrate that CEQA, in large measure, is designed to serve an informational function.<sup>8</sup> CEQA satisfies this information gathering function primarily through the "environmental impact report" (EIR).<sup>9</sup> The purpose of an EIR is to provide public agencies and the public in general with detailed information about the effect that a proposed project is likely to have on the environment.<sup>10</sup> Additionally, the EIR is used to list ways in which significant environmental effects of a project might be minimized and to indicate alternatives to the project.<sup>11</sup>

Whenever a proposed project *may* significantly affect the environment, CEQA requires the production of an EIR.<sup>12</sup> The apparent rationale behind the EIR process is that public agencies will make reasonable, environmentally sound decisions on projects as long as they possess and consider all relevant environmental information.<sup>13</sup> The effectiveness of CEQA, therefore, largely depends on the quality and the quantity of information that is provided to public agencies.<sup>14</sup>

The general rule requiring the production of an EIR for all proposed projects that may significantly affect the environment, however, is subject to numerous exceptions. These exceptions, or exemptions from the EIR requirement of CEQA, have been the subject of much controversy and litigation. For the most part, courts are reluctant to imply or otherwise arbitrarily broaden an exemption, absent clear legislative intent.<sup>15</sup> California appellate courts have not interpreted the specific class of CEQA exemptions pertaining to various emergency situations. This author will propose that the judicial reluctance to imply or broaden exemptions, should apply similarly to the emergency exemptions.

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7. Guidelines For Implementation of the California Environmental Quality Act of 1970, CAL. ADMIN. CODE tit. 14, §§15000-15387 [hereinafter referred to as State CEQA Guidelines].

8. See generally *id.*; CAL. PUB. RES. CODE §§21000-21176 (numerous sections throughout CEQA pertain to informational aspects).

9. CAL. PUB. RES. CODE §§21002.1 (use of environmental impact report) 21061 (definition of environmental impact report).

10. *Id.* §21061.

11. *Id.*

12. *Id.* §21100.

13. See Comment, *Environmental Decision Making Under CEQA: A Quest For Uniformity*, 24 U.C.L.A. L. REV. 838, 847 (1977).

14. *Id.*

15. See CAL. PUB. RES. CODE §§21080-21080.13, 21102, 21150, 21169-21172 (statutory exemptions); CAL. ADMIN. CODE tit. 14, §§15300-15329 (categorical exemptions); Note: *The Environmental Impact Statement Requirement In Agency Enforcement Adjudication*, 91 HARV. L. REV. 815, 825 (1977-78); see *infra* notes 69-99 and accompanying text.

In support of this proposition, this comment will focus on pertinent policy and procedural provisions of CEQA. Specifically, the following analysis will determine whether the emergency exemptions<sup>16</sup> found in CEQA can be, and in fact have been, used as a means of circumventing the EIR review process. This author suggests that, in many instances, use of the emergency exemptions may be consistent with the *letter* of the environmental regulations, though quite inconsistent with the *spirit* of CEQA.<sup>17</sup>

To illustrate this point, an examination of what constitutes an emergency under CEQA will be made, with consideration given to the role of economic factors in the environmental review process. As a model for discussing the broad, problematic balancing goals of CEQA, and application of the emergency exemption provisions, a recent project known as the Tulare Lake Emergency Pumping Project or “dewatering” project will be considered.<sup>18</sup> This project, involving substantial environmental and economic interests, clearly demonstrates the difficulties encountered by administrators of public agencies when they are required to make decisions under CEQA. For example, deciding whether an exemption properly applies to the facts of a given project may entail sophisticated statutory construction and intricate balancing of values.

This comment will provide a brief overview of CEQA, primarily in terms of policy orientation and procedural mechanics.<sup>19</sup> The importance of the EIR will be discussed, as will the various provisions exempting projects from the EIR review process.<sup>20</sup> After analyzing the emergency exemption provisions found in CEQA, the author will examine the background of the Tulare Lake Pumping Project and consider the local environment and economy of the Tulare Lake Basin.<sup>21</sup> As with any project evaluation under CEQA, this information is critical to enable the decision-maker to perform his duties properly.

In analyzing whether the emergency exemptions of CEQA could be or have been used to circumvent the EIR requirement, general principles of statutory construction, judicial interpretations of pertinent CEQA provisions, and legislative intent will be considered. While this author concedes that legitimate emergencies do merit a specific type

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16. CAL. PUB. RES. CODE §§21080(b)(2), (3), (4), 21172.

17. See *infra* notes 136-48 and accompanying text.

18. See *infra* notes 235-82 and accompanying text.

19. See *infra* notes 161-232 and accompanying text.

20. See *infra* notes 22-68 and accompanying text.

21. See *infra* notes 169-226 and accompanying text.

of administrative treatment, this comment will suggest that, in reality, various degrees of emergencies warrant different treatment. Each emergency situation likely will present the administrator with a differing set of facts and time constraints within which to determine the applicability of CEQA.

Has an "emergency" situation or a gubernatorial "declaration of emergency" become a talisman in whose presence CEQA fades away? Is CEQA the paper tiger it was initially characterized as, or a truly substantive act to be interpreted to afford the fullest possible protection to the environment? In answering these difficult, interpretational questions through the use of the Tulare Lake Model, this author will conclude that the emergency exemptions in fact have been abused in a manner inconsistent with the protectionist philosophy of CEQA. Since the policy and procedural provisions of CEQA are crucial to an understanding of the emergency exemptions, this comment preliminarily will evaluate these significant aspects of CEQA.

#### THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

As enacted in 1970, CEQA was characterized in various ways: as rather simple and uncomplicated, a paper tiger, paper pollution, even an Act in a period of gestation.<sup>22</sup> One commentator has gone so far as to claim that CEQA virtually was ignored in its infancy.<sup>23</sup> With the seminal case of *Friends of Mammoth v. Board of Supervisors*,<sup>24</sup> however, the California Supreme Court in 1972 declared the importance of CEQA as a procedural and substantive means of providing environmental protection.<sup>25</sup> In an era of commercial and industrial expansion in which the environment has been violated repeatedly by those who are oblivious to the ecological well-being of society, the significance of CEQA cannot be understated.<sup>26</sup> The court enormously expanded the potential of CEQA to affect governmental decision-making at all levels by holding that CEQA applies to any private and public activity for which a permit or similar entitlement is required.<sup>27</sup> Most importantly, *Friends of Mammoth* stands for the proposition that CEQA is to be interpreted to afford the *fullest possible*

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22. Hagman, *Foreword to Symposium: Environmental Law*, 19 SANTA CLARA L. REV. 513, 515-16 (1979).

23. Coment, *supra* note 13, at 841.

24. 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972).

25. *Id.* at 252, 502 P.2d at 1051-52, 104 Cal. Rptr. at 763-64.

26. *Id.* at 255, 502 P.2d at 1053, 104 Cal. Rptr. at 765.

27. *Id.* at 259, 502 P.2d at 1056, 104 Cal. Rptr. at 768; *see Comment, supra* note 13, at 842.

*protection* to the environment within the reasonable scope of the statutory language.<sup>28</sup>

As noted above, tremendous difficulties are encountered by administrative decision-makers seeking to balance significant environmental and economic considerations within the context of a project evaluation. Although the claim has been made that the primary purpose of CEQA merely is to provide an environmental full-disclosure document through the EIR,<sup>29</sup> a more persuasive argument can be made that CEQA represents a truly significant shift in the prioritization of values as they relate to the effects of projects on the environment.<sup>30</sup> One of the most important legislative policy statements in CEQA evidences the intent that "the long-term protection of the environments . . . shall be *the* guiding criterion in public decisions."<sup>31</sup> As a result, to the extent that agencies gave higher priority to the encouragement of economic growth than to consideration of environmental factors in the pre-CEQA era, CEQA has been instrumental in reordering the respective weight given to economic and environmental factors.<sup>32</sup> Project decisions under the CEQA framework must be made in a manner that gives higher priority to environmental considerations.<sup>33</sup> Thus, placing economic factors above, or even on an equal footing with environmental factors, should be viewed as a failure to comply with the spirit of the legislative intent.<sup>34</sup> Recent amendments to CEQA, however, may have injected a more significant economic component into the environmental review process.<sup>35</sup> For example, the Legislature has expressed as a policy of CEQA the goal of providing a decent home and satisfying living environment for every

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28. 8 Cal. 3d 247, 259, 502 P.2d 1049, 1056, 104 Cal. Rptr. 761, 768 (1972).

29. See Comment, *The Compatibility Of Economic And Environmental Objectives In Governmental Decision Making*, 5 PAC. L. J. 92, 97 (1974).

30. *Id.* at 99. Since CEQA was patterned after NEPA, federal court interpretation of NEPA is highly persuasive precedent for California court interpretations of CEQA. See *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247, 260, 502 P.2d 1049, 1057, 104 Cal. Rptr. 761, 769 (1972). The federal court in *Sierra Club v. Froehlke*, 359 F. Supp. 1289 (S.D. Tex. 1973) stated:

What must not be overlooked is the priority assigned by Congress to environmental factors under NEPA. As this court understands this body of law, protection of the environment is now viewed as paramount, and it is not to be placed on an equal footing with the usual economic and technical factors.

*Id.* at 1370.

31. CAL. PUB. RES. CODE §2100(d) (emphasis added).

32. See Comment, *supra* note 29, at 93.

33. See CAL. PUB. RES. CODE §§21000, 21001.

34. See Comment, *supra* note 29, at 98-99.

35. See, e.g., CAL. PUB. RES. CODE §§21000(g), 21001(d), 21080 (providing further CEQA exemptions).

Californian.<sup>36</sup> Nevertheless, as a general rule, the law does require that environmental factors be given clear priority in environmental decision-making.<sup>37</sup>

An additional legislative intent section of CEQA will be of importance to the analysis of the Tulare Lake Emergency Pumping Project. This section provides that the policy of the state is to prevent the elimination of fish or wildlife species due to man's activities.<sup>38</sup> Furthermore, the intent of the Legislature is to ensure that fish and wildlife populations do not drop below self-perpetuating levels.<sup>39</sup> Representations of all plant and animal communities and examples of the major periods of California history are to be preserved for future generations.<sup>40</sup>

The Tulare Lake Emergency Pumping Project posed a serious threat to the fisheries resources of the state.<sup>41</sup> The CEQA policy of preventing the elimination of fish or wildlife, therefore, is directly applicable to the facts of the Tulare Project and should have been given due consideration in the decisional process therein. In light of the decision to approve the pumping project, however, far too little consideration was accorded that state policy. Due to the insufficient deference to state policies on the part of agency decision-makers, the proposition that exemptions should be construed narrowly becomes substantially more important. This comment will show that current misuse of the emergency exemptions of CEQA likely will continue unless appropriate measures are implemented to restrict similar abuse. Before delving into these questions, an overview of the procedural mechanics of CEQA and a discussion of the backbone of CEQA, the EIR, will follow.

#### A. *The CEQA Procedural Road Map: A Three Step Process*

In a simplified manner, the environmental review process under CEQA can be explained in several phases.<sup>42</sup> The first determination to be made by a public agency is whether the project is subject to CEQA at all.<sup>43</sup> If the project is covered by a specific statutory or categorical exemption provision, then the process does not need to

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36. *Id.* §§21000(g), 21001(d).

37. *Id.* §21001(d).

38. *Id.* §21001(c).

39. *Id.*

40. *Id.*

41. *See infra* notes 227-32 and accompanying text.

42. CAL. ADMIN. CODE, tit. 14, §15002(k).

43. *Id.* §15002(k)(1).

proceed any further.<sup>44</sup> The agency *may* then prepare a notice of exemption.<sup>45</sup> If, on the other hand, no specific exemption applies to the proposed project, the provisions of CEQA are applicable. An agency designated as the “lead agency”<sup>46</sup> then must take the second step and conduct an initial study to determine whether the project may have a significant effect on the environment.<sup>47</sup> If the initial study shows that no substantial evidence exists to support a finding that the project may have a significant effect on the environment, the lead agency prepares a negative declaration.<sup>48</sup> This second step of the CEQA process represents the so-called general rule exemption, discussed in greater detail below.<sup>49</sup>

The negative declaration is a written statement that briefly describes the reasons why a proposed project will not have a significant effect on the environment and does not require the preparation of an EIR.<sup>50</sup> In *No Oil, Inc. v. City of Los Angeles*, the California Supreme Court stated that a determination that a project will not have a significant impact on the environment *must* take the form of a written negative declaration.<sup>52</sup> The negative declaration serves an important function of providing the public with notice and capacity to review project decisions by the various public agencies and to question or challenge those decisions when appropriate.<sup>53</sup> If the initial study shows that the project may have a significant effect, the lead agency takes the third step and prepares an EIR.<sup>54</sup>

### B. The EIR

At the heart of CEQA is the requirement that an EIR be generated for any project which *may* have a significant effect on the environment.<sup>55</sup> The EIR can be viewed as an environmental “alarm

44. *Id.*

45. *Id.*

46. “Lead agency” means the public agency that has the principal responsibility for carrying out or approving a project which may have a significant effect on the environment. CAL. PUB. RES. CODE §21067. For an extensive look at the concept of lead agency, see the State CEQA Guidelines. CAL. ADMIN. CODE tit. 14, §§15050-15053.

47. CAL. ADMIN. CODE tit. 14, §15002(k)(2).

48. *Id.*; CAL. PUB. RES. CODE §21064 (definition of negative declaration).

49. See *infra* notes 95-99 and accompanying text.

50. CAL. PUB. RES. CODE §21064.

51. 13 Cal. 3d 68, 529 P.2d 66, 118 Cal. Rptr. 34 (1974).

52. *Id.* at 80, 529 P.2d at 73-74, 118 Cal. Rptr. at 41-42 (emphasis added).

53. *Id.* at 86, 529 P.2d at 78, 118 Cal. Rptr. at 46.

54. CAL. ADMIN. CODE tit. 14, §15002(k)(3).

55. See *County of Inyo v. Yorty*, 32 Cal. App. 3d 795, 809, 810, 108 Cal. Rptr. 377, 387, 388 (1973).



bell" to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.<sup>56</sup> The purposes of the EIR are several: (1) to assist governmental decision-makers in analyzing the significant environmental effects of a proposed project; (2) to identify alternatives; and (3) to disclose ways to reduce or avoid the possible environmental damage.<sup>57</sup> Judicial interpretations of the EIR requirement have resulted in broad, expansive holdings and policy declarations.<sup>58</sup> For example, the purpose of the EIR has been described by courts as follows: (1) to inform other governmental agencies and the public generally of the environmental impact of a proposed project;<sup>59</sup> (2) to demonstrate to an apprehensive citizenry that the agency in fact has analyzed and considered the ecological implications of its action;<sup>60</sup> and (3) to enable the public to determine the environmental and economic values of their elected and appointed officials, thus allowing for appropriate action on election day.<sup>61</sup>

A comparison of the National Environmental Policy Act (NEPA) and the NEPA environmental impact statement (EIS) provision with the EIR provision of CEQA reveals a consistency of design and purpose.<sup>63</sup> This similarity has often led California courts to rely on federal legislative standards and judicial precedents that require the EIS to promote the general welfare and to maintain and restrict alterations in the environment.<sup>64</sup> The basic standards under both NEPA and CEQA mandate that the EIS and EIR include a detailed statement setting forth the foreseeable environmental impact and viable alternatives to the proposed action.<sup>65</sup>

56. *Id.*

57. CAL. PUB. RES. CODE §21061.

58. *See* County of Inyo v. Yorty, 32 Cal. App. 3d 795, 810, 108 Cal. Rptr. 377, 388 (1973); *Friends of Mammoth*, 8 Cal. 3d 247, 271-72, 502 P.2d 1049, 1065, 104 Cal. Rptr. 761, 777 (1972); Russian Hill Improvement Ass'n v. Board of Permit Appeals, 44 Cal. App. 3d 158, 165, 118 Cal. Rptr. 490, 495, 498 (1974).

59. No Oil, Inc. v. City of Los Angeles, 13 Cal. 3d 68, 86, 529 P.2d 66, 78, 118 Cal. Rptr. 34, 46 (1974) (citing with approval, County of Inyo v. Yorty, 32 Cal. App. 3d 795, 810, 108 Cal. Rptr. 377, 388 (1973)).

60. *Id.*

61. People v. County of Kern, 39 Cal. App. 3d 830, 841-42, 115 Cal. Rptr. 67, 75 (1974).

62. 42 U.S.C. §4321-4370.

63. *Compare id.* §4332 with CAL. PUB. RES. CODE §21061.

64. Environmental Defense Fund, Inc. v. Coastside County Water District, 27 Cal. App. 3d 695, 701, 104 Cal. Rptr. 197, 200 (1972).

65. 42 U.S.C. §4332(c)(i), (iii); CAL. PUB. RES. CODE §21061.

The informational importance of the EIR cannot be emphasized strongly enough. Recognizing this fact, a California Court of Appeal, in *Russian Hill Improvement Association v. Board of Permit Appeals*,<sup>66</sup> found that the preparation of an EIR is the single most important requirement of CEQA.<sup>67</sup> The importance of the EIR is illustrated further by judicial pronouncements that the EIR should be prepared as early in the planning process as possible to allow environmental considerations to influence decision-makers in approving or disapproving projects.<sup>68</sup> Since the EIR is the paramount informational mechanism provided by CEQA, an understanding of the availability and applicability of the various exemptions to the EIR requirement is necessary.

### C. Exemptions to the EIR Requirement

The threshold determination in CEQA is whether a proposed activity must undergo the EIR process or is exempted from CEQA procedures altogether.<sup>69</sup> An improper decision at this stage can allow a potentially significant environmental activity to be undertaken without careful assessment of its possible environmental effects.<sup>70</sup> The exemption scheme under CEQA can be divided into three general classifications: statutory exemptions, categorical exemptions, and those projects exempted under the "general rule."

#### 1. Statutory Exemptions Under CEQA

Statutory exemptions are those expressly provided within CEQA, enacted by the California Legislature.<sup>71</sup> Existing law provides nineteen classes of projects that in whole or in part, are statutorily free from the requirements of CEQA.<sup>72</sup> Perhaps the most important of

66. 44 Cal. App. 3d 158, 118 Cal. Rptr. 490 (1974).

67. *Id.* at 165, 118 Cal. Rptr. at 495.

68. See *Bozung v. Local Agency Formation Commission*, 13 Cal. 3d 263, 282-83, 529 P.2d 1017, 1030, 118 Cal. Rptr. 249, 262 (1975).

69. See *supra* notes 42-54 and accompanying text.

70. The California Supreme Court has stated that "where there is any reasonable possibility that a project or activity may have a significant effect on the environment, an exemption would be improper." *Wildlife Alive v. Chickering*, 18 Cal. 3d 190, 206, 553 P.2d 537, 545, 132 Cal. Rptr. 377, 385 (1976).

71. CAL. PUB. RES. CODE §§21080-21080.13, 21102, 21150, 21169-21172.

72. *Id.* The CEQA Guidelines explain that the statutory exemptions are either complete exemptions, partial exemptions, or exemptions applying only to the timing of CEQA compliance. CAL. ADMIN. CODE tit. 14, §15260.

these statutory exemptions provides that CEQA only applies to projects involving discretionary governmental actions.<sup>73</sup> Thus, nondiscretionary projects are entirely outside the CEQA process. Even discretionary actions may be exempt, however, provided another statutory, categorical, or "general rule" exemption applies. Examples of statutory exemptions include the following: ministerial actions,<sup>74</sup> actions taken under certified state regulatory programs,<sup>75</sup> various emergency actions,<sup>76</sup> actions relating to feasibility and planning studies,<sup>77</sup> and actions disapproving projects.<sup>78</sup>

## 2. Categorical Exemptions Under CEQA

Categorical exemptions,<sup>79</sup> on the other hand, include only those classes of projects that have been determined to have *no significant effect* on the environment.<sup>80</sup> Unlike the statutory exemptions enacted by the Legislature, these classes of projects are prepared by the Office of Planning and Research and adopted by the Secretary of the Resources Agency, pursuant to the CEQA mandate.<sup>81</sup> The rationale behind the categorical exemptions is sound: administrative resources should not be wasted on environmental analysis regarding projects which have been *determined* in advance not to have a significant effect on the environment.<sup>82</sup> This use of exempt categories has enabled agencies to carry out or approve most minor or routine projects without being required to conduct individual environmental studies.<sup>83</sup> Examples of some of the thirty existing categorical exemptions include: replacement or reconstruction of existing facilities,<sup>84</sup> projects classified as

73. CAL. PUB. RES. CODE §21080(a) (exempting non-discretionary projects from CEQA). The CEQA Guidelines define a "discretionary project" as "a project which requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove 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." CAL. ADMIN. CODE tit. 14, §15357.

74. CAL. PUB. RES. CODE §21080(b)(1).

75. *Id.* §21080.5.

76. *Id.* §§21080(b)(2), (3), (4), 21172.

77. *Id.* §21102.

78. *Id.* §21080(b)(5).

79. *See generally* CAL. ADMIN. CODE tit. 14, §§15300-15329 (categorical exemptions under CEQA).

80. *Id.* §15300.

81. CAL. PUB. RES. CODE §§21083, 21084.

82. *See* Bendix, *A Short Introduction To The California Environmental Quality Act*, 19 SANTA CLARA L. REV., 521, 524 (1979).

83. *See* Comment, *supra* note 13, at 853.

84. CAL. ADMIN. CODE tit. 14, §15302.

minor,<sup>85</sup> new construction or conversion of small structures,<sup>86</sup> specified actions taken by regulatory agencies,<sup>87</sup> and designations of wilderness areas.<sup>88</sup>

The categorical exemptions have been criticized by commentators and challenged in the courts.<sup>89</sup> The major arguments against the propriety of these exemptions are that: (1) no proper finding has been made to exempt certain classes of projects;<sup>90</sup> (2) the exemptions are overbroad;<sup>91</sup> and (3) the use of exempt categories has created serious difficulties resulting from variations in the interpretation and application of the categories by public agencies.<sup>92</sup> At one time, the Resources Agency seriously considered classifying the categorical exemptions as rebuttable presumptions.<sup>93</sup> In spite of these arguments, however, the number, scope, and apparent use of these categorical exemptions continue to increase.<sup>94</sup>

### 3. The "General Rule" Exemption

Finally, when a specific project does not fit one of the express statutory or categorical exemptions, thus triggering the second step in the CEQA process, the "general rule" exemption still may apply.<sup>95</sup> This "general rule" will exclude a proposed project from review if evidence can be put forth to show with certainty that the activity in question poses *no* possibility of having a significant effect on the environment.<sup>96</sup> Unlike the categorical exemptions that are determined in advance to present no significant effect on the environment, the general rule exemption requires case-by-case analysis to determine whether the project is exempted. While some CEQA decision-makers

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85. *Id.* §§15304 (minor alterations to land), 15305 (minor alterations in land use situations), 15314 (minor additions to schools), 15315 (minor land divisions).

86. *Id.* §15303.

87. *Id.* §§15307, 15308, 15321.

88. *Id.* §15318.

89. See Comment, *California's Environmental Quality Act - A Significant Effect Or Paper Pollution?*, 5 PAC. L. J. 26, 39-40 (1974).

90. *Id.* at 39.

91. *Id.* at 40.

92. See Comment, *supra* note 13, at 853.

93. See California Resources Agency, California EIR Monitor 8 (Sept. 10, 1981) (vol. 8, No. 15).

94. For example, according to an index of the categorical exemptions produced by the Resources Agency in 1974, the State CEQA Guidelines contained 12 categorical exemptions. *Id.* EIR Monitor 4 (Jan. 11, 1974) (vol. 1, No. 3).

95. CAL. ADMIN. CODE tit. 14, §15061(b)(3).

96. *Id.*

have been reluctant to use this rule due to its vagueness and questionable statutory origin, others have used it for years without challenge.<sup>97</sup> One commentator considers use of the "general rule" to be a calculated risk.<sup>98</sup> Regardless of whether a statutory, categorical, or "general rule" exemption is employed in a given situation, the effect of the exemption decision is the same: the provisions of CEQA requiring generation of an EIR are rendered inapplicable.

The specific exemptions of concern in this comment are the statutory emergency exemptions.<sup>99</sup> Absent judicial interpretation of these provisions, administrators have been left to construe these exemptions independently according to their own conception of the scope and the legislative intent supporting the exemptions. To ascertain the manner in which the statutory emergency exemptions *should* be construed and applied, an analysis of cases interpreting similar provisions is required.

#### 4. *Judicial Treatment of CEQA Exemption Decisions*

A series of well-reasoned California decisions has strictly construed the provisions of CEQA within the context of analyzing various exemption decisions by public agencies. By doing so, these courts have reiterated the proposition stated in *Friends of Mammoth* that CEQA is to be interpreted to afford the fullest possible protection to the environment.<sup>100</sup> Most important among these cases is *Wildlife Alive v. Chickering*,<sup>101</sup> decided by the California Supreme Court in 1976. The issue before the court was whether the setting of hunting and fishing seasons by the California Fish and Game Commission was an action to which CEQA applied.<sup>102</sup> The court observed that no *express* exemption, either statutory or categorical, applied to the facts presented.<sup>103</sup> Accordingly, the court relied largely on a well-accepted rule of statutory construction and legislative intent to find that an *implied* exemption also would be improper.<sup>104</sup>

The rule applied by the court is the doctrine of *expressio unius est exclusio alterius*.<sup>105</sup> According to this doctrine, the creation of a limited express exemption suggests that a broader implied exemption

97. Bendix, *supra* note 82, at 525.

98. *Id.*

99. CAL. PUB. RES. CODE §§21080(b)(2), (3), (4), 21172.

100. 8 Cal. 3d 247, 259, 502 P.2d 1049, 1056, 104 Cal. Rptr. 761, 768 (1972).

101. 18 Cal. 3d 190, 553 P.2d 537, 132 Cal. Rptr. 377 (1976).

102. *Id.* at 195, 553 P.2d at 538-39, 132 Cal. Rptr. at 379.

103. *Id.*

104. *Id.* at 206, 553 P.2d at 546, 132 Cal. Rptr. at 386.

105. The doctrine of *expressio unius est exclusio alterius* is a maxim of statutory interpreta-

could *not* have been intended.<sup>106</sup> The express exemption, pertaining to certified state regulatory programs that allow certain agencies to follow special abbreviated procedures, was interpreted to imply a rejection of other exemptions not expressly granted in CEQA.<sup>107</sup> The importance of the EIR again was illustrated by the declaration of the court that if the EIR provision were not applied, no other provision of the law would require a consideration of reasonable alternatives.<sup>108</sup>

The *Wildlife Alive* court analyzed the applicability of both statutory and categorical exemptions. The statutory exemption allowing a specified alternative review process for qualified agencies having important environmental protection responsibilities<sup>109</sup> seemingly was applicable to the Commission. Due to the fact that the Commission had not applied for and adopted an alternative regulatory program, however, the court found that the statutory exemption was inapplicable.<sup>110</sup> Perhaps more interesting was the discussion by the court of the categorical exemption<sup>111</sup> sought to be utilized. In describing the legislative and administrative process by which categorical exemptions are established,<sup>112</sup> the court stated the general rule that no administrative regulation is valid if its issuance exceeds the scope of the legislative enabling statute.<sup>113</sup> In other words, since the Secretary of the Resources Agency is empowered by statute to exempt *only* those activities that do not have a significant effect on the environment, any regulation that exempts a project which *may* significantly affect the environment, of necessity, must fail as exceeding the scope of the enabling statute. The court openly doubted whether the categorical exemption in question was authorized.<sup>114</sup> In light of the finding that the categorical exemption sought to be applied was inapplicable to the facts presented, the court was not required to determine its validity.<sup>115</sup>

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tion meaning that the expression of one thing is the exclusion of the other. BLACK'S LAW DICTIONARY 521 (5th ed. 1979). Under this maxim, if a statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded. *Id.*

106. 18 Cal. 3d at 196, 553 P.2d at 539-40, 132 Cal. Rptr. at 380.

107. *Id.*

108. *Id.* at 197, 553 P.2d at 540, 132 Cal. Rptr. at 380-81.

109. CAL. PUB. RES. CODE §21080.5.

110. See 18 Cal. 3d at 199, 205, 553 P.2d at 541-42, 545, 132 Cal. Rptr. at 383, 385.

111. CAL. ADMIN. CODE tit. 14, §15313.

112. 18 Cal. 3d at 204, 553 P.2d at 544-45, 132 Cal. Rptr. at 384-85; see CAL. PUB. RES. CODE §21084.

113. *Id.* at 205, 553 P.2d at 545, 132 Cal. Rptr. at 385.

114. *Id.*

115. See *id.* at 205-206, 553 P.2d at 545, 132 Cal. Rptr. at 385.

In addition, the *Wildlife Alive* court stated that use of an exemption is improper whenever any reasonable possibility exists that a project *may* have a significant effect on the environment.<sup>116</sup> Furthermore, the California Supreme Court would not abandon the "fullest possible protection" standard of *Friends of Mammoth* by unreasonably expanding regulatory language to imply an exemption.<sup>117</sup> The *Wildlife Alive* decision demonstrates the substantial deference to the important legislative intent provision of CEQA that California courts must recognize in adjudicating disputes relating to CEQA.

Another case that strictly construed the categorical exemptions of the State CEQA Guidelines is *Myers v. Board of Supervisors*,<sup>118</sup> decided by the California Court of Appeal in 1976. *Myers* dealt with the problem raised by individual counties, cities, or other public entities, developing and implementing their own environmental guidelines, *purportedly* in conformity with CEQA and the State CEQA Guidelines.<sup>119</sup> Specifically, the court held that Santa Clara County had misclassified projects known as "minor land divisions" by including them in an exempt category.<sup>120</sup> The court pointed out that the "minor land division" in question would involve fairly extensive changes to a currently natural area, including grading of a steep hillside, placing of storm drains and utility poles in steep terrain and across a stream, and possible creation of a severe fire hazard.<sup>121</sup>

One commentator has observed that the State CEQA Guideline directing individual agencies or entities to list those classes of categories that *they* feel fall within the exempt categories, causes problems regarding uniformity.<sup>122</sup> The problem lies in the divergent interpretations given to the categories, each according to subjective perceptions of agency functions. Thus, a project that is nonexempt by one agency may be exempt by another, even though no real differences exist between the two projects.<sup>123</sup>

116. *Id.* at 206, 553 P.2d at 545, 132 Cal. Rptr. at 385.

117. *Id.*

118. 58 Cal. App. 3d 413, 129 Cal. Rptr. 902 (1976).

119. California Public Resources Code section 21082 provides that: "all public agencies shall adopt by ordinance, resolution, rule, or regulation, objectives, criteria, and procedures for the evaluation of projects and the preparation of environmental impact reports and negative declarations pursuant to . . . [CEQA]."

120. 58 Cal. App. 3d at 423, 129 Cal. Rptr. at 906.

121. *Id.* at 426, 129 Cal. Rptr. at 909.

122. See Comment, *supra* note 13, at 853-54. To avoid this problem, the author suggested that public agencies should not be given the discretion to determine the applicability of CEQA to entire project categories. *Id.* at 854. Instead, agencies should be permitted to make these determinations only within strictly prescribed limits. *Id.*

123. See *id.* at 853.

Since classification of a project as exempt removes it from the ambit of CEQA, incorrect classification can have serious consequences. Recognizing that this situation hindered the CEQA goal of *statewide* protection of the environment through uniform application of CEQA regulations, the *Myers* court was outraged by the apparent misuse of the beneficent CEQA legislation.<sup>124</sup> “What is most clearly demonstrated by the instant case,” the *Myers* court remarked, “is the reluctance of local agencies to acknowledge as real the dangers to the environment which compelled the legislature in 1970 to enact emergency legislation [CEQA].”<sup>125</sup> The court considered the misclassification of projects as either categorically exempt or as a ministerial action to be one of the easiest methods for *evading* the CEQA process.<sup>126</sup> The court concluded by cautioning that misuse and nonuse of the CEQA provisions may be avoided (and clearly should be avoided) *by complying strictly* with the provisions of CEQA.<sup>127</sup>

The 1977 case of *City of Coronado v. California Coastal Zone Conservation Commission*<sup>128</sup> provides further judicial support for the proposition that CEQA exemption provisions are to be strictly construed. The court in this case framed the central issue in conspicuously familiar terms: whether in the absence of an express exemption, an implied exemption may be inferred.<sup>129</sup> After examining pertinent CEQA statutes and application of recognized maxims of statutory construction, the court answered this question with an unqualified “no.”<sup>130</sup> Consistent with the holdings in *Wildlife Alive* and *Myers*, the court in *City of Coronado* stated that when a statute expresses certain exceptions to a general rule, other exceptions are necessarily excluded.<sup>131</sup> The court concluded that the permit-granting function of the California Coastal Commission is an activity subject to the EIR requirements of CEQA.<sup>132</sup> The action taken by the Commission, therefore, in implying an exemption to CEQA, was contrary to the legislative intent and thus constituted a void act.<sup>133</sup>

Recent cases, both upholding and rejecting agency use of categorical exemptions, provide additional discussion of the standards to be ap-

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124. See 58 Cal. App. 3d at 431, 129 Cal. Rptr. at 912.

125. *Id.*

126. *Id.* (emphasis added).

127. *Id.* (emphasis added).

128. 69 Cal. App. 3d 570, 138 Cal. Rptr. 241 (1977).

129. *Id.* at 579, 138 Cal. Rptr. at 247.

130. *Id.*

131. *Id.* at 580, 138 Cal. Rptr. at 247; see *supra* notes 101-27 and accompanying text.

132. *Id.* at 581-82, 138 Cal. Rptr. at 248-49.

133. *Id.* at 583, 138 Cal. Rptr. at 249.



plied in complying with CEQA and the scope of agency authority to declare exemptions.<sup>134</sup> The above mentioned cases, however, provide ample authority for the proposition that exemption decisions are not to be made casually. Members of the California judiciary have demonstrated that they will continue to construe exemption provisions strictly in accordance with the CEQA framework.<sup>135</sup> Having developed the posture of the courts in the general context of CEQA exemptions, this comment will analyze the specific class of exemptions known as the emergency exemptions.

#### D. Emergency Exemptions Under CEQA

Of the specific statutory exemptions contained in CEQA, three directly pertain to emergencies.<sup>136</sup> These emergency exemptions are embodied in two sections of the Public Resources Code.<sup>137</sup> The Code sections provide that CEQA shall not apply to the following types of projects: (1) emergency repairs to public service facilities necessary to maintain service;<sup>138</sup> (2) projects undertaken, carried out, or approved by a public agency to maintain, repair, restore, demolish, or replace property or facilities damaged or destroyed as a result of a disaster in a disaster-stricken area in which a state of emergency has been proclaimed by the Governor;<sup>139</sup> and (3) specific actions necessary to prevent or mitigate an emergency.<sup>140</sup> To assist in the proper application of these provisions, CEQA defines the term "emergency."<sup>141</sup> The essential components of an emergency are as follows: a sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to life, health, property, or essential public services.<sup>142</sup> The CEQA defini-

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134. See generally *International Longshoremen's and Warehousemen's Union, Local 35 v. Board of Supervisors*, 116 Cal. App. 3d 265, 276, 171 Cal. Rptr. 875, 882 (1981) (holding the use of the categorical exemption provided by the CEQA Guidelines section 15308 was improper for a change in a county air pollution rule that allowed a doubling of the emissions of nitrogen oxides); *Dehne v. County of Santa Clara*, 115 Cal. App. 3d 827, 845, 171 Cal. Rptr. 753, 764 (1981) (holding the use of the categorical exemption provided by the CEQA Guidelines section 15303 was proper for a replacement structure of substantially the same size, in the same place, and for the same purpose, and when the record contains no evidence that the project would have a significant effect on the environment).

135. See *infra* notes 100-34 and accompanying text.

136. CAL. PUB. RES. CODE §§21080(b)(2), (3), (4), 21172.

137. *Id.*

138. *Id.* §21080(b)(2).

139. *Id.* §§21080(b)(3), 21172.

140. *Id.* §21080(b)(4).

141. *Id.* §21060.3.

142. *Id.*

tion lists fire, flood, earthquake, riot, accident, and sabotage as examples of situations constituting an "emergency."<sup>143</sup>

As noted above, California appellate courts have not interpreted the meaning and scope of the emergency exemptions. The public agencies charged with applying CEQA, however, apparently have had ample opportunity to interpret the meaning of these exemptions.<sup>144</sup> This agency interpretation has resulted in varying applications of the emergency exemptions, giving rise to problems of multi-agency standards and lack of CEQA uniformity.<sup>145</sup>

At least in principle, the emergency exemptions are appropriate, common sense provisions. The theory behind these exemptions is that if a project arises for which the lead agency simply *cannot* complete the requisite paperwork within the time constraints of CEQA, then pursuing the project without complying with the EIR requirement is justifiable.<sup>146</sup> For example, if a dam is ready to burst or a fire is raging out of control and human life is threatened as a result of delaying a project decision, application of the emergency exemption would be proper.

All evidence points to the conclusion, however, that the emergency exemptions are being applied in too liberal a manner and thus inconsistently with the policy of CEQA.<sup>147</sup> Experts see this misuse not as isolated occurrences but as an apparent trend.<sup>148</sup> CEQA contains the framework for putting a halt to this trend. Changes are required, however, to revitalize the pertinent provisions that are designed for this very purpose. Most importantly among these is the "notice of exemption" provision which, at present, is a significant deficiency in the CEQA notice scheme.

### *E. The Problem of Notice Under CEQA: Are the Emergency Exemptions Too Frequently Employed?*

Under current law, neither a state nor a local public agency is required to file a "notice of exemption" upon declaring itself exempt

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143. *Id.*

144. The word "apparently" is used here due to the mechanics of current notice provisions under CEQA. *See infra* notes 149-60, and accompanying text.

145. *See supra* notes 118-23 and accompanying text.

146. *See* 1983 CEQA Hearings Before the Assembly Committee On Natural Resources (testimony of Nick Arguimbau, Attorney, Californians For A Better Environment) [hereinafter referred to as CEQA Hearings] (copy on file at the *Pacific Law Journal*).

147. *Id.*

148. *Id.*

from CEQA.<sup>149</sup> Nonetheless, a primary beneficial effect of filing a notice of exemption, from the standpoint of the public in environmental protection, is the publication of agency exemption decisions.<sup>150</sup> Additionally, the filing of this document has the legal effect of triggering a shorter statute of limitations period on legal challenges to the agency decision that the project is exempt from CEQA.<sup>151</sup> Therefore, an agency is faced with an interesting choice, the resolution of which will likely depend on the philosophical or political posture of the specific agency. Filing the notice of exemption may result in a challenge from the public or other governmental agency. This "risk" is offset, however, by the strict time constraints within which a challenge may be brought. A decision not to file the notice of exemption, on the other hand, may result in less attention being drawn to the project, though a far greater time frame is provided within which challenges may be brought.

This author suggests that the risk of a challenge to an agency exemption decision should not enter into the decisional framework of a public agency with responsibilities under CEQA. Considerations of this nature are inappropriate in the CEQA context. When regulating activities to give *major consideration* to preventing environmental damage,<sup>152</sup> agencies should not only welcome, but actively solicit responsible and informative input from the general public.<sup>153</sup> The absence of required notices of exemption further complicates the difficulties with the emergency exemptions highlighted in the preceding section.<sup>154</sup> The Tulare Lake Emergency Pumping Project, discussed below,<sup>155</sup> is a classic illustration of these complications.

While the CEQA notice provisions are optional for both state and

149. See CAL. PUB. RES. CODE §§21108(b) (*state agency may file a Notice of Exemption upon a finding of non-applicability of CEQA*), 21152(b) (*local agency may file a Notice of Exemption upon a finding of non-applicability of CEQA*).

150. "Publication" in this context, means the posting of the notice of exemption in either the office of a county clerk or Office of the Secretary of the Resources Agency. See *infra* notes 158-60 and accompanying text.

151. The CEQA Guidelines provide that the filing of a notice of exemption starts a 35 day statute of limitations period on legal challenges to the agency exemption decision. CAL. ADMIN. CODE tit. 14, §15062(d). If a notice of exemption is not filed, a 180 day statute of limitations will apply. *Id.*

152. CAL. PUB. RES. CODE §21000(g).

153. In support of the proposition that the public is intended to play a vital role in the CEQA process, see sources cited *infra* note 283. See generally Stein, *Public Administration as Politics*, in CURRENT ISSUES IN PUBLIC ADMINISTRATION 27 (1978); Simon, *Decision Making*, in CURRENT ISSUES IN PUBLIC ADMINISTRATION 337 (1978); Edmund G. Brown Jr., *A Society of the People. And by. And For.*, in CURRENT ISSUES IN PUBLIC ADMINISTRATION 493 (1978).

154. See *supra* notes 144-48 and accompanying text.

155. See *infra* notes 161-232 and accompanying text.

local agencies,<sup>156</sup> the law provides different locations for filing notices of exemption. *Local* agencies deciding to file a notice of exemption must do so with the county clerk of each county in which the project will be located.<sup>157</sup> *State* agencies deciding to file a notice of exemption, however, are required to file these notices with the Secretary of the Resources Agency.<sup>158</sup> Given the fact that actions taken by local agencies in many instances may be far more extensive than those of state agencies, no discernible reason exists for providing a convenient central repository for state notices only. Thus, while the frequency of use of the emergency exemptions is difficult to estimate for both state and local agencies, the problem is especially acute in the case of local agencies.<sup>159</sup> A conservative estimate of state and local agency use of emergency exemptions could be placed at several thousand over the past five years.<sup>160</sup> In addition, when agencies decide not to file a notice of exemption, ascertaining what specific emergency exemption has been employed is often impossible. Absent mandatory filing of a notice of exemption, therefore, the public is denied the opportunity to become involved in the review process to safeguard its interest. Notices of exemption warrant application of the same standards of environmental documentation as the EIR or Negative Declaration due to the importance of the exemption decision.

This comment has demonstrated that existing notice provisions under CEQA represent an additional hurdle to the ability of the public to challenge exemption decisions. The important question remaining is whether agencies are properly invoking the emergency exemptions in light of the provisions of CEQA and pertinent case law. Before analyzing this specific question through the facts of the Tulare Lake Emergency Pumping Project, a discussion of the events involved in the project, important history, economic and environmental considerations will follow.

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156. CAL. PUB. RES. CODE §§21108(b), 21152(b).

157. *Id.* §21152(b).

158. *Id.* §21108(b).

159. This is due to the fact that offices of 58 California County Clerks would have to be visited. The Notice of Exemption files in each office would have to be searched and tabulated to determine the number of notices filed by local agencies. Of course, due to the optional nature of the CEQA filing provision, the sum of all notices filed in these 58 offices would represent only the number of notices *actually* filed, not the number of exemption decisions actually made.

160. This is a rough estimate based on the number of notices of exemption filed by *state* agencies with the Secretary of the Resources Agency in a recent one-year period. This search alone took several hours of manual investigation by this author.

THE TULARE LAKE PROJECT MODEL

The Tulare Lake Emergency Pumping or "dewatering" project is a recent example of agency use of a CEQA emergency exemption. For purposes of analysis, this comment explores the relevant factual background surrounding the project.<sup>161</sup> As an introductory note, however, several brief comments will prove helpful. The essence of the dewatering project consisted of a plan by several large California agribusinesses to remove great quantities of floodwater that covered otherwise prime agricultural lake bed land.<sup>162</sup> The project was an ambitious one, involving the dredging and widening of miles of river, purchase and installation of massive pumps to drain the lake and dispose of the water, and construction of a metal fish screen designed to prevent a predatory species of bass from entering the Sacramento-San Joaquin Delta ecosystem, the final destination of the drained floodwaters.<sup>163</sup> Many months of planning were devoted to the pumping project that was estimated to cost the growers \$12 million.<sup>164</sup> Significantly more than this sum was at stake, however, to the growers and the local economy.<sup>165</sup>

Despite the tremendous potential impact on the environment, the project was declared exempt from the CEQA EIR requirements. Tulare Lake Reclamation District 749 (TLRD 749), the lead agency involved in the pumping project, determined that the gubernatorial declaration of emergency made in response to the floods of the *previous* winter triggered application of the declaration of emergency exemption, thereby rendering CEQA inapplicable to the pumping project.<sup>166</sup> Upon finding CEQA inapplicable, substantial public concern and legal challenges followed. The predominant concern was expressed by fisheries biologists: if the predatory white bass were introduced to the Delta estuary, a significant threat would be presented to the maintenance and survival of the highly valued salmon and striped bass commercial and sport fisheries.<sup>167</sup> In addition, criticism was made regarding the administrative processes designed to ensure environmental review of projects posing environmental risks.<sup>168</sup> This comment will

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161. See *infra* notes 162-234 and accompanying text.

162. San Francisco Chronicle, Aug. 26, 1983, at 1, col. 1.

163. *Id.* at 1, col. 1, 4, col. 1-4.

164. Los Angeles Times, Oct. 7, 1983, Part. 1, at 3, col. 1.

165. Sacramento Bee, Oct. 23, 1983, at A22, col. 1; see also notes 225-26 and accompanying text.

166. Telephone conversation with Norma Wood, Office of Planning and Research (Oct. 17, 1983) (notes on file at the *Pacific Law Journal*).

167. See *infra* notes 227-32 and accompanying text.

168. San Francisco Chronicle, Sept. 8, 1983, at 22, col. 1.

discuss in further detail the important factual data, economic and environmental considerations and chronology of this project. By so doing, a complete picture of the application of the emergency exemption may be drawn.

#### A. History of Tulare Lake and Area Flooding

Tulare Lake is a *natural* lake located in Kings County, in the San Joaquin Valley.<sup>169</sup> At one time it was the largest lake in California, covering up to 800 square miles.<sup>170</sup> During the latter part of the nineteenth century, Tulare Lake was considered to be a *permanent* part of the geography of the state.<sup>171</sup> Early reports described the lake as navigated, with docks at several locations, and as actively fished on a commercial basis.<sup>172</sup> Beginning in the 1880s, water diversions from the rivers feeding Tulare Lake and the construction of levees began to allow reclamation of the lake bed for agricultural use.<sup>173</sup> A 1947 report of the Bureau of Reclamation indicates that over twenty reclamation districts were formed between 1896 and 1925 to assist in the reclamation of the lake bed and to prevent large areas from being inundated when new floods occurred.<sup>174</sup>

Although operating with considerable hazard from both flood and drought, the Tulare Lake area was developed and farmed many years prior to the completion of federal flood control reservoirs on the tributary streams in 1962.<sup>175</sup> Despite these flood control reservoirs, however, periodic floods of *large magnitude* remain a significant part of farming life in the Tulare Lake Basin.<sup>176</sup> In wet years, therefore, the lake expands within its natural lake bed, and land that can be farmed in drier years is inundated. Significant flooding has occurred in ten of the twenty-eight years from 1954 through 1981.<sup>177</sup> Because 1982-83 was a wet year, approximately 126 square miles (81,600 acres) of lake bottom were flooded under roughly 710,000 acre-feet of

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169. See Army Corps of Engineers, ENVIRONMENTAL ASSESSMENT, Application No. 8370, Reclamation District 749 (Oct. 7, 1983) [hereinafter cited as ENVIRONMENTAL ASSESSMENT].

170. See Tulare Lake Basin Water Storage District, *Report on Irrigation, Drainage and Flooding In The Tulare Lake Basin 4* (Sept. 1981), Appendix 4 of ENVIRONMENTAL ASSESSMENT, *supra* note 169 [hereinafter referred to as Appendix 4].

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 5.

176. *Id.* at 37.

177. *Id.*

water.<sup>178</sup> To understand the effect of these periodic floods on the typical land owner in the Tulare Lake Basin, a look at land ownership in the Tulare region is necessary.

### B. Land Ownership in the Tulare Lake Area

On a purely hydrographic basis,<sup>179</sup> the Tulare Lake area could be described at the present time as an area of approximately 250,000 acres or 390 square miles.<sup>180</sup> A 1981 report by the Tulare Lake Basin Water Storage District stated that four operators farm more than ninety percent of the Tulare Lake Basin Water Storage District assessed acreage, while a total of eight operators farm nearly ninety-eight percent of the area.<sup>181</sup> The characteristic farm operation in the Tulare Lake area, therefore, consists of large holdings of land owned by the operator, plus a substantial amount of land leased from absentee landowners.<sup>182</sup> In the classic sense, no small "family farms" operate in the Tulare Lake area.<sup>183</sup> The Tulare Lake Emergency Pumping Project was carried out and approved by several of these large agricultural landowners and TLRD 749.

### C. The Tulare Lake "Emergency" Pumping Project

TLRD 749 was the lead agency that planned and implemented the Tulare Lake Emergency Pumping Project during 1983-84. The pumping or "dewatering" project was designed to remove a major portion of the water covering lake bed land.<sup>184</sup> TLRD 749 is a local agency, within the meaning of CEQA,<sup>185</sup> organized and operated under provisions of the California Water Code.<sup>186</sup> The primary responsibilities of the district are to construct and maintain reclamation facilities for the benefit of persons and companies owning land within the district in the Tulare Lake bed.<sup>187</sup>

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178. See Tulare Lake Reclamation District 749, *Kings River Emergency Pumping Project* 1-2 (Sept. 1983), in Appendix 1 of ENVIRONMENTAL ASSESSMENT, *supra* note 169 [hereinafter referred to as Appendix 1].

179. Hydrography is the description, measurement, and study of seas, lakes, rivers and other bodies of water. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1109 (1976).

180. Appendix 4, *supra* note 170, at 4.

181. *Id.* at 8.

182. *Id.*

183. *Id.*

184. See ENVIRONMENTAL ASSESSMENT, *supra* note 169, at 1.

185. CAL. PUB. RES. CODE §21062 (definition of local agency).

186. See CAL. WATER CODE §§50000-53901.

187. See *id.* §50652. Though TLRD 749 is composed of 8 members, it is dominated by two large farming companies, Salyer American and the J.G. Boswell Co. See Los Angeles Times, Oct. 7, 1983, at 3, col. 1.

The specific goals of the “dewatering” project were as follows: (1) to reclaim the agricultural land then flooded in time for 1984 planting; (2) to lessen the likelihood of additional flooding during 1984; and (3) to permit further maintenance on area levees.<sup>188</sup> To accomplish these goals, the south fork of the Kings River was dredged and widened significantly.<sup>189</sup> This channelization allowed the southward direction of the river to be reversed, by the drawing out and pumping northward of the great quantities of water then residing in Tulare Lake.<sup>190</sup> In the process, the banks of the river were largely destroyed, including trees of over one hundred years.<sup>191</sup> Construction and installation of the pumping stations soon followed. Through a series of locks and dams, these pumps would lift the water twenty feet in elevation to dispose of the water via the north fork of the Kings River, into the San Joaquin River and eventually out to sea through the Sacramento-San Joaquin Delta.<sup>192</sup>

The pumping was intended to be continuous for approximately seven months.<sup>193</sup> When white bass were discovered in the floodwaters, a massive fish kill quickly became part of the project.<sup>194</sup> Rotenone, a chemical fatal to fish, but allegedly harmless to humans, was sprayed from boats and helicopters, killing thousands of fish of many species.<sup>195</sup> Before pumping resumed, the affected water had to be detoxified.<sup>196</sup>

While the primary objection to these project activities was the possibility that predatory white bass from Tulare Lake would be introduced into the Delta ecosystem, other concerns were also manifested. The destruction of natural riparian habitat was especially disappointing to fishermen. Additionally, concern over water quality and pollution was prevalent.<sup>197</sup> Finally, considerable attention was drawn to

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188. See Appendix 1, *supra* note 178, at 1-2.

189. See San Francisco Chronicle, Aug. 26, 1983, at 1, col. 1, and at 4, col. 4.

190. See *id.* at 1, col. 1, and at 4, col. 1.

191. See Los Angeles Times, Oct. 7, 1983, Part 1, at 23, col. 1.

192. See *id.* at 1, col. 6, and at 3, col. 1.

193. Under the terms of the permit issued by the Army Corps of Engineers, pumping was to run no later than April 7, 1984, or whenever the Fish and Game Department determined that white bass were about to begin spawning. Sacramento Bee, Jan. 11, 1984, at AA4, co. 1-2.

194. See *id.*, Oct. 11, 1983, at A4, col. 1.

195. *Id.*

196. See *id.*, Oct. 16, 1983, at A23, col. 1-2.

197. An interesting question raised by this project is whether or not the project involves a “discharge” within the meaning of the State Water Quality Act, and further, whether the discharge is a “waste.” Although the California Water Code does not define “discharge,” the State Water Resources Control Board has defined the terms very broadly. “Waste” is defined as including: “sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, . . .” CAL. WATER CODE §13050(d). Under the reasoning of an opinion of the Attorney General, the conclusion could be reached that the water pumped from Tulare Lake, *with* the white bass, constitutes



the possible effects on humans resulting from the spraying of the rotenone.<sup>198</sup> The threat to the Delta fisheries, though, was clearly the most significant. Estimates place the economic value of the salmon and striped bass populations at well over \$10 million annually.<sup>199</sup> As these economic and environmental concerns became fully established, the Tulare Lake Pumping Project attracted both extensive media and litigation-oriented attention.

#### D. *The Controversy, Chronology, and Federal Involvement*

The Tulare Lake Pumping Project was planned, designed, and constructed in large part prior to any federal or state agency involvement.<sup>200</sup> Only when news of this project became public throughout the state by newspaper publications, did several important federal and state agencies learn of the project.<sup>201</sup>

Since the pumping activity was subject to the concurrent authority of *both* federal and state agencies,<sup>202</sup> proponents of the pumping project were required to satisfy the provisions of both NEPA and CEQA.<sup>203</sup> Rather than pursue a course of active compliance with the state and federal requirements, TLRD 749 remained passive. The chief administrator of TLRD 749 was quoted as stating: "we assumed that if the District needed a permit, I would be told."<sup>204</sup> This statement clearly reveals the failure of certain public agency decision-makers to uphold the duties of their agency conscientiously. Regarding the application of CEQA, TLRD 749 argued that it was under no obligation to prepare an EIR due to the claimed emergency exemption.<sup>205</sup>

a discharge of waste. See 43 Op. Cal. Atty. Gen. 302, 304 (June 18, 1969). On Oct. 14, 1983, waste discharge requirements were ordered for the pumping project. See California Regional Water Quality Control Board - Central Valley Region, order No. 83-128 (Oct. 14, 1983) (copy on file at the *Pacific Law Journal*).

198. See Letter from Sally Tanner, Chairwoman of the Assembly Committee on Consumer Protection and Toxic Materials, to Howard D. Carper, Former Director, California Dept. of Fish and Game (Oct. 12, 1983) (expressing serious public health and environmental concerns regarding the use of the pesticide Rotenone) (copy on file at the *Pacific Law Journal*).

199. ENVIRONMENTAL ASSESSMENT, *supra* note 169, at 4. The economic value of the Delta fisheries, like the annual anticipated revenues from farming Tulare Lake bed land, runs into the tens of millions of dollars. Sacramento Bee, Oct. 23, 1983, at A22, col. 1.

200. See Sacramento Bee, Nov. 30, 1983, at A5, col. 1-2. The pumping project was being worked on approximately 6 months prior to the "discovery" of white bass in Tulare Lake. See Los Angeles Times, Oct. 7, 1983, at 3, col. 1.

201. See Sacramento Bee, Nov. 30, 1983, at A5, col. 1-2.

202. See CAL. ADMIN. CODE tit. 14, §15220.

203. *Id.*

204. Sacramento Bee, Nov. 30, 1983, at A5, col. 2.

205. See Department of the Army, Permit Application No. 8370 (permit effective date Oct. 7, 1983).

The concern over the environmental impact of this project led both the United States Fish and Wildlife Service and the National Marine Fisheries Service to request that the Army Corps of Engineers require TLRD 749 to obtain a section 404 permit for the project.<sup>206</sup> The section 404 permit process under the Federal Clean Water Act<sup>207</sup> regulates the discharge of dredged or fill material into the waters of the United States.<sup>208</sup> This process also requires inter-agency consultation and public involvement.<sup>209</sup> In exercising its jurisdiction over navigable bodies of water, the Corps advised TLRD 749 that it must obtain a section 404 permit before it could begin pumping the floodwaters.<sup>210</sup> The Corps, however, did not issue an order stopping the dredging and construction that already was under way. Following submittal of the application by TLRD 749 for the 404 permit, the Corps decided that an "emergency situation" existed and prescribed special processing procedures.<sup>211</sup> Under these procedures, the public review and comment period, a crucial component of federal environmental regulations, was reduced from the normal thirty days to eight days.<sup>212</sup> Shortly after the comment period was closed, the Corps announced that no EIS would be prepared because the project would have "no significant impact on the environment."<sup>213</sup> A section 404 permit was issued<sup>214</sup> and the project pumping began immediately.<sup>215</sup>

On September 19, 1983, the Sierra Club and the Environmental Defense Fund filed suit in the Federal District Court for the Northern District of California seeking declaratory and injunctive relief.<sup>216</sup> Specifically, plaintiffs sought a judgment declaring that section 404 permit procedures were not complied with and enjoining the Army Corps of Engineers from granting the 404 permit.<sup>217</sup> On October 19, 1983, these plaintiffs, joined by Assemblyman Phil Isenberg, lost their bid for a temporary restraining order to halt the pumping recently

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206. See ENVIRONMENTAL ASSESSMENT, *supra* note 169, at 12; see also 33 U.S.C. §1344 (section 404 permit required under the Clean Water Act).

207. 33 U.S.C. §§1251-1376.

208. *Id.*

209. *Id.* See generally Blumm, *Wetlands Preservation, Fish and Wildlife Protection, and 404 Regulation: A Response*, 18 LAND AND WATER L. REV. 469, 485-86 (1983) (defending the permit program against charges of bureaucratic red tape and overregulation).

210. ENVIRONMENTAL ASSESSMENT, *supra* note 169, at 12.

211. *Id.* at 13; see 47 Fed. Reg. 31819 (1982) (codified at 33 C.F.R. §325.2(e)(4)).

212. See 47 Fed. Reg. 31819 (1982) (codified at 33 C.F.R. §325.2(e)(4)).

213. See "Findings of No Significant Impact" in ENVIRONMENTAL ASSESSMENT, *supra* note 169.

214. See Department of the Army, Permit (granted Tulare Lake Reclamation District 749 in response to application number 8370) (effective date Oct. 7, 1983).

215. Sacramento Bee, Oct. 7, 1983, at A3, col. 1.

216. Sierra Club v. Palladino, No. 83-4423 (N.D. Cal. filed Sept. 19, 1983).

217. *Id.* at 14.

authorized by the Corps. The district court found that the Corps of Engineers and TLRD 749 did not violate federal law by allowing commencement of the pumping.<sup>218</sup>

In opposition to the project, the plaintiffs argued that: (1) the threat of introducing white bass into the Delta and subsequent ecological effects on the Delta fisheries was great, even though a fish screen was installed in an attempt to strain white bass out of the water being pumped; (2) no adequate environmental review transpired; (3) both NEPA and CEQA requirements were being circumvented; (4) valuable riparian habitats were being destroyed; (5) no discussion or analysis of alternatives occurred prior to project authorization; and (6) no emergency existed.<sup>219</sup> The defendants and others in favor of the project were primarily farmers, merchants, businessmen, and citizens from the Tulare Lake area.<sup>220</sup> The dominant argument posed by these individuals was economic.<sup>221</sup> The dewatering of the lake would allow the land to be farmed, resulting in benefit to the local economy.<sup>222</sup> A secondary argument pertained to the maintenance and repair of levees, made possible through lowered lake levels.<sup>223</sup>

While the purpose of this comment is to analyze the use or abuse of the emergency exemptions under CEQA, this glance at federal involvement reveals clear cause for concern regarding significant loopholes in the federal environmental scheme. In fact, as of this writing, a subcommittee of the House of Representatives is holding hearings on numerous categories of projects that can proceed without satisfying permitting regulations.<sup>224</sup> Before analyzing the application of the CEQA emergency exemptions to the facts of the Tulare Lake Project, this comment first must evaluate the relevant economic and environmental considerations associated with the project.

### *E. Tulare Lake Economic Considerations*

The Kings and Tulare County area depends heavily on agriculture. The environmental assessment prepared by the Army Corps of Engineers under emergency processing procedures stated the estimated gross income resulting from the successful completion of this project

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218. See *Sacramento Bee*, Oct. 20, 1983, at A3, col. 1.

219. See ENVIRONMENTAL ASSESSMENT, *supra* note 169, at 17 (summary of arguments and concerns).

220. *Id.* at 16.

221. *Id.*

222. *Id.*

223. See Appendix 1, *supra* note 178, at 2.

224. See *Sacramento Bee*, Nov. 30, 1983, at A5, col. 2.

to be \$30 million.<sup>225</sup> Furthermore, the application by TLRD 749 for the Corps permit estimated that 1500 jobs would remain lost if the project were not approved.<sup>226</sup> With these significant economic hardships placed on the area economy, having the flooded land back in production as soon as possible clearly would be desirable. Given the unambiguous judicial position and legislative intent of CEQA that environmental values are to be assigned greater weight than economic needs, the question remains whether the decision to proceed at the local level was justified in light of the serious environmental risks to the Delta and Kings River ecosystems.

#### F. *The Environmental and Economic Threat to the Delta*

This comment has demonstrated that the pumping of floodwaters from Tulare Lake raises the possibility that the predatory white bass will be introduced to the Delta ecology.<sup>227</sup> White bass have become well established in the Kaweah River, which feeds Tulare Lake, and Tulare Lake itself.<sup>228</sup> Fisheries experts state that if given the opportunity, the white bass will thrive in the Sacramento and San Joaquin Rivers, in the Delta, and in many Central Valley Reservoirs.<sup>229</sup> If the white bass flourish in the Delta, a *significant threat* to the striped bass, steelhead, and salmon commercial and sport fisheries of the Delta is presented.<sup>230</sup>

The fundamental question is whether permanent vitality of these fisheries resources is worth more in economic and noneconomic terms than a *temporary* loss of farmland.<sup>213</sup> Stated alternatively, the question is whether the fisheries are worth more than a *chance* that the *experimental* fish barrier, installed to prevent introduction of white bass into the Delta, will work.<sup>232</sup> Having discussed much of the perti-

225. See *Findings of No Significant Impact*, in ENVIRONMENTAL ASSESSMENT, *supra* note 169.

226. See Appendix 1, *supra* note 178, at 1.

227. *Id.* at 12; see *supra* note 163, 199 and accompanying text.

228. See Declaration of Dr. Peter B. Moyle, Wildlife and Fisheries Biologist 3 (Sept. 1983), in Appendix 7a of ENVIRONMENTAL ASSESSMENT, *supra* note 169 [hereinafter referred to as Appendix 7a].

229. *Id.*

230. See *id.* at 5-8; see also Sacramento Bee, Oct. 23, 1983, at A22, col. 1 (stating further that the estimated annual worth of the commercial and sport salmon industry is \$10 million). In light of the additional likelihood that the white bass would migrate up the eight rivers flowing to the Delta, including the Sacramento and its major tributaries like the American, the threat posed by the escape of white bass from Tulare Lake is truly of statewide proportions. See *id.*

231. Assemblyman Phillip Isenberg, Pumping Tulare Lake Water To the Delta, A Tragedy in the Making, (Oct. 26, 1983) (copy on file at the *Pacific Law Journal*).

232. See Appendix 7a, *supra* note 228, at 9 (stating that the Tulare pumping project will be an experiment on a grand scale, without any control and without the approval of biologists charged with managing our fisheries); see Declaration of Charles Wagner, Consulting Engineer,

nent project information, this comment will continue by setting forth arguments in favor of strict construction of the emergency exemptions.

#### THE STATUTORY CONSTRUCTION—LEGISLATIVE INTENT ARGUMENT

In those instances in which particular statutes have not been litigated, the meaning and intent of those statutes may be debated. The function of rules of statutory construction is to ascertain the legislative intent, as expressed in the statutory language.<sup>233</sup> The purpose of determining legislative intent is to allow courts or other interpreting entities to effectuate the purpose of the law involved.<sup>234</sup>

Generally, all rules of construction assume some statutory ambiguity or uncertainty, since no need arises to apply rules of construction for ascertaining legislative intent if the statutory language is clear and unambiguous.<sup>235</sup> The emergency exemptions and definitional provisions of CEQA admit some degree of uncertainty, primarily relating to the intended meaning and scope. Since CEQA provides a definition of "emergency," this definition must be used for purposes of construction, as opposed to use of definitions of "emergency" in other legal contexts or other code sections.<sup>236</sup> The question posed with respect to the Tulare Lake Project is whether the CEQA definition of "emergency," requiring a sudden, unexpected occurrence involving a clear and imminent danger to life, health, or property, is applicable to the project. To answer this question, the emergency or perceived emergency giving rise to the declaration of exemption by TLRD 749 must be identified. In the district court action to enjoin the Tulare Project pumping operations, the plaintiffs argued that no emergency existed, while the defendants contended that a serious economic emergency was present.<sup>237</sup> Furthermore, one CEQA commentator claims that any emergency that may have existed in the Tulare Lake situation was entirely the result of actions taken by the reclamation

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5-6 (Oct. 1983), Appendix 7b in ENVIRONMENTAL ASSESSMENT *supra* note 169 (hereinafter referred to as Appendix 7b) (expressing concern about the experimental nature of the fish screen and the belief that a screening structure has never been built to prevent passage of 100% of white bass).

233. H.S. Mann Corp. v. Moody, 144 Cal. App. 2d 310, 320, 301 P.2d 28, 35 (1956).

234. Hogya v. Superior Court of San Diego County, 75 Cal. App. 3d 122, 132, 142 Cal. Rptr. 325, 332 (1977).

235. Smith v. Rhea, 72 Cal. App. 3d 361, 365, 140 Cal. Rptr. 116, 118 (1977).

236. See B.P. Schulberg Productions, Ltd. v. California Employment Commission, 66 Cal. App. 2d 831, 835, 153 P.2d 404, 406 (1944) (example of a case using this general statutory rule).

237. See *supra* notes 200-24 and accompanying text.

district itself.<sup>238</sup> Under this view, therefore, the project would not be covered by the CEQA definition of emergency.

Significant flooding of Tulare Lake can be *expected* on the average of *one in every three years*.<sup>239</sup> The flooding *that had already occurred* months prior to planning of the pumping project, therefore, was not a sudden, *unexpected* occurrence as required by the CEQA definition.<sup>240</sup> Similarly, the concern over lost revenues due to the inability to farm flooded lake bed land cannot be characterized as a *clear and imminent danger* to life, health, property, or essential public services.<sup>241</sup> The Tulare Lake Project did *not* involve a situation in which lives were threatened due to a dam break or a raging fire. The only threat involved was that land owned by several large agribusiness conglomerates would remain out of production unless a quick means of project approval could be secured. Use of the declaration of emergency exemption by TLRD 749 served precisely this purpose. While the CEQA definition of "emergency" includes the occurrence of floods, the *existing condition* of flooding in the Tulare Basin posed no imminent threat to life or the long-term continued productivity of property. Thus, the CEQA definition was *not* applicable to the Tulare Project, since the flood was not sudden, nor unexpected, nor imminently threatening harm.<sup>242</sup>

In construing statutes, courts do not sit as superlegislatures, questioning the wisdom or motive of legislative enactments.<sup>243</sup> Rather, the role of the courts is to declare the law, not to make it.<sup>244</sup> A specific presumption maintains that the legislature does not intend to legislate by implication.<sup>245</sup> If the legislature had intended to include a provision relating to a given subject in the body of a statute, that intention would have been expressed.<sup>246</sup> This construction is connected closely with the maxim *expressio unius est exclusio alterius*,<sup>247</sup> which declares that the specific enumeration of acts, things, or persons as

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238. See 1983 CEQA Hearings, *supra* note 146.

239. See *supra* notes 175-78 and accompanying text.

240. CAL. PUB. RES. CODE §21060.3.

241. *Id.*

242. See *id.* §21060.3

243. Estate of Horman, 5 Cal. 3d 62, 77, 485 P.2d 785, 796, 95 Cal. Rptr. 433, 444 (1971), *cert. denied*, 404 U.S. 1015 (Jan. 10, 1972).

244. Treppa v. Justice's Court of No. 3 Township, 1 Cal. App. 2d 374, 377, 36 P.2d 819, 820 (1934).

245. Meier v. Superior Court of California, 67 Cal. App. 135, 140, 227 P. 490, 492 (1924).

246. *Id.*

247. See *supra* notes 105-06 and accompanying text.

coming within the operation of a statute will preclude the inclusion by implication of other acts, things, or persons.<sup>248</sup>

Application of these rules leads to the conclusion that purely economic emergencies or self-created emergencies are not covered by this CEQA provision. Nowhere in the CEQA definition is any mention made, expressly or impliedly, regarding the economic concern of lost revenues. In addition, in *People v. Kern County*,<sup>249</sup> the court held that economic hardship caused to the applicant by delays in getting approval of a project under CEQA could *not* justify approval without compliance with the law.<sup>250</sup>

As noted, the Tulare Project was planned, designed, and constructed over a period of many months. Not until federal and state agencies were informed of the project did TLRD 749 decide that an emergency existed. The threatened delay from an environmental review process, even though the delay was the result of TLRD 749 failing to apply CEQA earlier, could have resulted in millions of dollars of lost revenue if pumping were not completed by planting season. Thus, use of the declaration of emergency exemption allowed the project to proceed. As in the *Kern County* case, however, the economic hardship that led to the Tulare Project did not justify proceeding with the project under an emergency exemption.

TLRD 749 did not file a notice of exemption for the pumping project. The problem of ascertaining what specific exemption was found applicable to this project, therefore, is raised.<sup>251</sup> Apparently, the emergency exemption employed by TLRD 749 was the gubernatorial declaration of emergency.<sup>252</sup> This comment has demonstrated that the emergency exemptions dependent on the CEQA definition of "emergency" were inapplicable to the Tulare Project because the project did not constitute a CEQA emergency.<sup>253</sup> When applying the gubernatorial declaration of emergency exemption, application of the CEQA definition of emergency also would appear improper.<sup>254</sup> In-

248. *People v. Mancha*, 39 Cal. App. 3d 703, 713, 144 Cal. Rptr. 392, 397 (1974).

249. 62 Cal. App. 3d 761, 133 Cal. Rptr. 389 (1976).

250. *Id.* at 776, 133 Cal. Rptr. at 399.

251. *See supra* notes 149-60 and accompanying text.

252. The word "apparently" must be used here because TLRD 749 did not file a notice of exemption from which to determine the grounds for the exemption decision.

253. *See supra* notes 236-42 and accompanying text.

254. This is because the word "emergency" is not used in an independent manner as is the case with the other emergency exemptions. *Compare* CAL. PUB. RES. CODE §§21080(b)(3), 21172 *with id.* §§21080(b)(2), (4). The "declaration of emergency" exemptions employ the phrase "state of emergency" and specifically require the meaning to be used pursuant to the "state of emergency" provision in the Government Code. *See id.* §§21080(b)(3), 21172; CAL. GOV'T. CODE §8625.

stead, use of the definition provided by the California Emergency Services Act<sup>255</sup> would seem to effectuate more closely the legislative intent as expressed in the exemption provision.<sup>256</sup>

The essential query, therefore, is whether the declaration of emergency exemption applies to the facts of the Tulare Project. This exemption applies to projects that respond to a disaster in a disaster-stricken area in which a state of emergency has been proclaimed by the Governor pursuant to the Emergency Services Act.<sup>257</sup> According to the Act, a “state of emergency” means the duly proclaimed existence of conditions of disaster or of extreme peril to the safety of persons and property within the state caused by conditions such as air pollution, fire, flood, storm, epidemic, riot, drought, sudden and severe energy shortage, plant or animal infestation or disease, earthquake, or other conditions.<sup>258</sup> Whether this definition of emergency covers the facts of the Tulare Project is tantamount to questioning whether the gubernatorial proclamation of emergency, in response to the flooding of forty-four California counties in 1982-83, was proper.<sup>259</sup> In another sense, the question really is *how long* a “state of emergency” remains in effect *for CEQA purposes*, as opposed to non-CEQA purposes.

The essential police power to declare a “state of emergency” in appropriate circumstances, is based on the concern and responsibility of government to provide for the health, safety, and welfare of its citizenry.<sup>260</sup> Further discussion of the propriety of emergency proclamations is beyond the scope of this comment. Consideration must be given, however, to the proper effect that an emergency declaration is to have on project decisions under CEQA.

In addition to authorizing the Governor to declare a state of emergency in appropriate situations, the Emergency Services Act further specifies that the Governor may suspend regulations when necessary.<sup>261</sup> While no case law exists pertaining to the scope of this

255. CAL. GOV'T. CODE §§8550-8668.

256. CAL. PUB. RES. CODE §§21080(b)(3), 21172.

257. *Id.*

258. CAL. GOV'T CODE §8558(b).

259. This may be somewhat of an overstatement. In a sense, since the legislature in Public Resources Code sections 21080(b)(3) and 21172 has grafted the provisions of the Emergency Services Act onto these CEQA emergency exemptions, the mere incantation of the “state of emergency” by an agency can be argued as sufficient for exemption. In effect, this negates the significant judicial gloss that, of necessity, overlays the use of all exemptions. *See supra* notes 103-37 and accompanying text (discussion of *Wildlife Alive*, *Myers*, and *City of Coronado* cases).

260. *See* CAL. GOV'T CODE §8550(a).

261. *See id.* §8571.



authority, an opinion of the California Attorney General in another context states that the Emergency Services Act *does not* authorize the Governor to suspend the operation of California wage law.<sup>262</sup> As CEQA provides for *automatic* suspension of the EIR requirement upon application of the state of emergency exemption, the limitation on the Governor's powers with respect to the wage law is merely instructive from a policy standpoint.<sup>263</sup> Just as the potential effect of a proclaimed state of emergency was shown to be restricted by the Attorney General's opinion, the effect should also be restricted with regard to the applicability of this CEQA exemption.<sup>264</sup>

A recent federal case has interpreted "emergency" to determine the applicability of a Disaster Relief Act definition of emergency to NEPA. *Colon v. Carter*<sup>265</sup> dealt with one aspect of the problems caused by the influx of Cuban and Haitian refugees into Florida during 1980. On May 6, 1980, President Carter issued a declaration of emergency in response to this unusual event.<sup>266</sup> The declaration was made following notices of violations of the Florida Sanitary Code pertaining to overcrowding and improper sewage treatment in the camps where the refugees were housed.<sup>267</sup> The federal government devised a plan whereby several thousand refugees were to be transferred to a location in Puerto Rico.<sup>268</sup> This action was argued to be exempt from the provisions of NEPA based on the Federal Disaster Assistance Act.<sup>269</sup> The Commonwealth of Puerto Rico and others brought suit to enjoin this project until an adequate environmental review transpired.

262. See 54 Op. Cal. Atty. Gen. 31, 38 (1971).

263. Given the importance of the exemption decision the "automatic," essentially mechanical use of the emergency exemption when based on an extant "state of emergency" would appear to be clearly contrary to the intent of CEQA as interpreted by the courts. See *Wildlife Alive v. Chickering*, 18 Cal. 3d 190, 206, 553 P.2d 537, 546, 132 Cal. Rptr. 377, 386 (1976). Where *any* reasonable possibility exists that a project or activity may have a significant effect on the environment, an exemption would be improper. *Id.* See also *infra* notes 265-74 and accompanying text (discussion of *Carter v. Colon*).

264. The effect of a declared "state of emergency" for purposes of CEQA should be limited so that the qualitative aspects of the situation leading the agency to exempt itself are evaluated, rather than the mere use of an extant "state of emergency" proclamation.

265. 507 F. Supp. 1026 (D.P.R. 1980).

266. *Id.* at 1028. If a "state of emergency" were declared without satisfying the notion of "emergency" under the Emergency Services Act, a challenge to an exemption decision by an agency would be quite proper. This is, however, the identical question raised above pertaining to a challenge to the proclamation of emergency itself, assuredly a very difficult case to prove. For purposes of proving either abuse of discretion by the President or Governor or nonapplicability of the emergency proclamation to CEQA, the standard of review should be relaxed in light of the goals CEQA seeks to achieve.

267. *Id.*

268. *Id.* at 1028-29.

269. *Id.* at 1031.

The district court stated that a presidential declaration of emergency was in effect at the time of the exemption decision, and even though that declaration was deserving of great deference, judicial review of the declaration was proper in light of the circumstances.<sup>270</sup> The court held that the definition of “emergency” under the Federal Disaster Relief Act,<sup>271</sup> which is similar to the CEQA definition, did not support the application of the exemption to the refugee situation.<sup>272</sup> Relying on the plain meaning of the statutory definition and legislative intent, the court found that only *natural* disasters of an unusual, sudden, and unexpected nature fell within the scope of the definition.<sup>273</sup>

*Colon* is highly instructive for the reasonable, nonmechanical treatment given to the concept of “emergency” for environmental purposes, and more importantly, for analyzing the *effect* of a declared “state of emergency” on environmental exemptions.<sup>274</sup> As the “emergency” in the Tulare Project was economic, and thus, non-natural, the gubernatorial declaration of emergency should not have been used to exempt the pumping project from the provisions of CEQA. Strict construction of the CEQA declaration of emergency exemption, therefore, is appropriate in light of the *Colon* rationale and the general judicial posture toward all CEQA exemptions.

The second question posed above, regarding the duration of a “state of emergency” *for purposes of CEQA*, truly raises the issue of whether the “state of emergency” exemption has become a talisman in whose presence CEQA fades away. In the Tulare Lake scenario, the proclamation of emergency was made no later than March 15, 1983, and was still in effect when TLRD 749 declared itself exempt over five months later, in August 1983.<sup>275</sup> At this point, however, even project proponents conceded that the physical emergency had dissipated, evolving into a perceived economic emergency.<sup>276</sup> Thus, the exercise

270. *Id.*

271. 42 U.S.C. §5122(1) (codifying section 102(1) of the Disaster Relief Act).

“‘Emergency’ means any hurricane, tornado, storm, flood, high water, winddriven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, drought, fire, explosion, or other catastrophe in any part of the United States which requires Federal Emergency assistance to supplement State and local efforts to save lives and protect property. . . .”

*Id.*

272. *Colon*, 507 F. Supp. at 1032.

273. *Id.*

274. *Id.*

275. See Proclamation of a State of Emergency, signed by Gov. George Deukmejian, March 21, 1983 (copy on file at the *Pacific Law Journal*).

276. See Telephone conversation with Mike Nordstrom, Attorney for Tulare Lake Storage District (Dec. 7, 1983) (notes on file at the *Pacific Law Journal*).

of this specific emergency exemption *has* taken on a rote, mechanical aspect, *in effect*, ignoring the qualitative requirements imposed by CEQA to justify an "emergency." Furthermore, since the *natural* condition of Tulare Lake land fluctuates between wet and dry conditions, a serious question arises whether the pumping project was designed to "restore" or "replace" property in accordance with the exemption.<sup>277</sup> Again, what is sought to be replaced here are anticipated profits from farming lake bed land in dry years. As analyzed above, no legislative intent can be found to support the inference that lost profits fall within the emergency exemption.<sup>278</sup>

In addition to finding the emergency exemptions (other than the declaration of emergency exemption) inapplicable to the Tulare Project because of the failure to satisfy the CEQA definitional component, this author maintains that further ground for denying the emergency exemptions is found in the exemptions themselves. One of these exemptions pertains to emergency repairs to public service facilities necessary to maintain service.<sup>279</sup> This exemption is inapplicable to the pumping project by virtue of the lack of damage to any public service facilities. Similarly, the other exemption for specific actions necessary *to prevent or mitigate an emergency*,<sup>280</sup> would fail. Whatever natural emergency situation may have originally existed was no longer in existence at the time the exemption decision was made.

Of concern here is the likelihood that every wet year, the identical short-term "solution" with the identical long-term environmental threats, will be employed. If an ongoing exemption for this type of project is to be established, the requisite procedures must be followed. Should a categorical exemption be sought, CEQA specifies the requisite procedures.<sup>281</sup> If a statutory exemption is sought, the legislative forum is the appropriate body for the decision. The apparent trend revealing an abuse of the emergency exemptions would be best characterized as the type of bootstrapping or exemption by implication or misclassification that the California courts have cautioned against so strongly.<sup>282</sup>

#### PROPOSALS TO AMEND PERTINENT CEQA PROVISIONS

Since the authority to declare a project exempt from the requirements

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277. See CAL. PUB. RES. CODE §§21080(b)(3), 21172.

278. See *supra* notes 243-53 and accompanying text.

279. CAL. PUB. RES. CODE §21080(b)(2).

280. *Id.* §21080(b)(4).

281. See *id.* §21086.

282. See *supra* notes 100-35 and accompanying text.

of CEQA is often largely in the hands of the state or local sponsoring agency alone, improved notice provisions should be required to inform the public of agency decisions that, arguably, are contrary to the purpose of CEQA. To the extent that filing notices of exemption is not required of public agencies, the public is unable to provide input for the benefit of decision-makers.<sup>283</sup> Under this system, projects may be approved and undertaken within a very short time period, in essence, hidden from public view. For these reasons, this author proposes that a *mandatory* notice of exemption provision be made applicable to all public agencies. Furthermore, the EIR Monitor, published by the Resources Agency,<sup>284</sup> should return to its past format under which exemption decisions and the specific exemption applied were made available to concerned CEQA observers.<sup>285</sup>

This author also proposes that an agency exemption under the state of emergency provision be evaluated in terms of the *degree* of emergency necessitating the exemption. Currently, this is theoretically accomplished through proper exercise of discretion at the lead agency level. The Tulare Lake Project Model, however, reveals that this discretion is suspect.<sup>286</sup> Given the notion that the blanket "state of emergency" exemption presently represents an "easy" exemption, many agencies will apply it mechanically. A list of criteria to assist in the determination of the degree or imminence of the emergency would be invaluable in assessing whether the facts of a given situation, *as they currently exist*, justify the use of an emergency exemption. As a result, agency discretion will retain the role it currently occupies. With proper criteria, both environmental and economic, the goals of CEQA can only be furthered.

Additionally, while the State CEQA Guidelines provide for public review of both EIRs and negative declarations,<sup>287</sup> no similar provi-

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283. See *id.* §§21108, 21152. California courts have long recognized the value and importance of public input in the CEQA process. See *Russian Hill Improvement Association v. Board of Permit Appeals*, 44 Cal. App. 3d 158, 167, 171, 118 Cal. Rptr. 490, 496, 498 (1974). Disclosure of the EIR *prior to the administrative decision* is required by CEQA to permit input from the public and other agencies. *Id.* at 166, 118 Cal. Rptr. at 495. Public participation is an integral part of the environmental review process and creates a feedback mechanism to improve the quality of public decision making. Bendix, *supra* note 82, at 529.

284. The Secretary of Resources will provide for publication of a bulletin entitled "California EIR Monitor" on a subscription basis to provide public notice of amendments to the guidelines, the completion of draft EIRs, and other matters as deemed appropriate. CAL. ADMIN. CODE tit. 14, §15240.

285. The language of CEQA Guidelines section 15240 clearly allows for this proposed format. *Id.*

286. See *supra* notes 161-232 and accompanying text.

287. See CAL. ADMIN. CODE tit. 14, §§15087, 15200-15210.

sion for review exists for exemption decisions. Undoubtedly, the impact of a poor decision at this early stage may be far more severe than later in the process.<sup>288</sup> To safeguard against agency abuse of discretion in this regard, a provision for public review of exemption decisions, where appropriate, should be enacted. The above notice and exemption proposals are entirely in accord with general CEQA policies of adequate notice and informational input involving broad sectors of society.

The specific statutory exemptions of CEQA render the procedural and substantive review provisions inapplicable to projects they are intended to cover.<sup>289</sup> In the case of emergencies, agencies should abide by the CEQA provisions as early in the project as possible with the proviso that *if* a valid emergency arises prior to the completion of CEQA documentation, then going forward with the project is justifiable.<sup>290</sup> Thus, in the Tulare Lake Project, much, if not all, of the CEQA documentation, including thorough analysis of alternatives, could have been completed prior to the declared emergency.<sup>291</sup>

This concept of requiring the CEQA documentation and review process to begin early in the process and continue until a valid emergency exempts further compliance should result in some documentation being prepared within the existing framework. Thus, when confronted by a less pressing emergency situation in which decisions may properly be made after several days or even weeks of evaluation, an abbreviated environmental document or "mini EIR" should be generated to analyze the impact of the proposed project and reasonable alternatives to that project.<sup>292</sup> For instance, in the Tulare Lake scenario, an environmental document along the lines of a "mini EIR" would have discussed the *factual data* pertinent to analyzing the alternatives available to the dredging and pumping operation. Alternative proposals included the following: (1) breaching existing agricultural levees in order to reduce the danger of flooding to nearby towns; (2) moving the floodwaters south from the Tulare Basin into the California Aqueduct; (3) diverting the water to groundwater recharge basins to counter conditions of overdraft; (4) allowing a significant part of the

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288. See *supra* notes 123-27 and accompanying text.

289. See CAL. PUB. RES. CODE §§21080-21080.13, 21172.

290. See 1983 CEQA Hearings, *supra* note 146.

291. *Id.*

292. This "mini-EIR" should be similar in format to the CEQA EIR. See CAL. PUB. RES. CODE §21061. Conceptually, this "mini-EIR" could resemble the type of documentation that results from the abbreviated review procedures authorized by the statutory exemption relating to certified state regulatory programs. See *id.* §21080.5.

lake to remain established as a waterfowl habitat and for recreation; (5) draining of a smaller portion of the lake, thereby reducing the need for pumping to begin immediately; and (6) doing nothing, or a "no project" alternative.<sup>293</sup> This final alternative deserves special mention due to the fact that even if the project were entirely successful, a wet year in 1983-84 effectively would have negated the project efforts, leaving the lake bed land under water for yet another period of time.<sup>294</sup> TLRD 749, in its permit application, observed that several long-range 1983-84 weather forecasts predicted another very wet year. Moreover, TLRD 749 noted that the project would *not* result in the dewatering of Tulare Lake by the 1984 growing season if the basin was subjected to heavy inflow during the winter or spring of 1984.<sup>295</sup> In light of these statements implying a *slight* chance of project success, the exemption decision appears to have been improper. The Environmental Assessment prepared by the Army Corps of Engineers merely raised and discarded three alternative proposals as unreasonable.<sup>296</sup> Additional reliable information that would be prepared under the "mini EIR" framework would have enabled the decision-maker to evaluate all the relevant data before rendering a decision.

#### CONCLUSION

Through a historical and policy oriented approach to examining CEQA and the emergency exemptions contained therein, this com-

293. CAL. ADMIN. CODE tit. 14, §15126(d) (alternatives to the proposed action). The specific alternative of "no project" shall also be evaluated along with the impact. *Id.* §15126(d)(2). In 1973, the National Water Commission, in a report entitled "Water Policies for the Future," made some eminently reasonable suggestions that pertain to the Tulare Lake Project herein discussed. See TRELEASE, CASES AND MATERIALS, WATER LAW 694-95 (3rd Ed. 1979). The Commission, while recommending that flood plain lands should be treated as an important resource and managed so as to make the maximum net contribution to national welfare, reminds the Congress that the material wealth of the nation is not enhanced by the development of lands subject to flood overflow unless the net value of the resulting production exceeds the costs of development plus the flood losses, or the cost of preventing such losses, and that non-material values sacrificed through the development must be counted as costs. *Id.* The Commission emphasized that fuller consideration should be given to alternative measures such as flood plain management plans and zoning, development of other lands not subject to flooding, and use of flood plains for open space, recreational and park purposes. *Id.*

Furthermore, while on the subject of consideration of alternatives, consider Governor Deukmejian's statements in his January 10, 1984 State of the State address. The Governor remarked that efforts to increase surface and groundwater storage capacity south of the Delta will be high on the agenda of the administration. See Sacramento Bee, Jan. 11, 1984, at A13, col. 5.

294. See Tulare Lake Reclamation District 749, Application For A Department Of The Army Permit (Sept. 9, 1983), Attachment No. 3 (copy on file at the *Pacific Law Journal*).

295. *Id.*

296. See ENVIRONMENTAL ASSESSMENT, *supra* note 169, at 1-2. The three options rejected by the Corps of Engineers were the following: (1) to move the water south from the Tulare Lake Basin into the California Aqueduct; (2) to divert the water to groundwater recharge basins in Kern County; and (3) to deny the permit, i.e., the no-project alternative. *Id.*

ment has sought to determine whether the largely unchecked discretion with which agencies may use these exemptions has resulted in unjustified circumvention of the procedural and substantive provisions of CEQA. The Tulare Lake Project Model has been analyzed as an example involving these CEQA provisions. The overall goals of CEQA have been explored to elucidate the decision-maker's dilemma. The difficult task of determining when and in what weight economic factors are to be considered in the CEQA process has been discussed, primarily in the context of a CEQA "emergency." While economics is a vital force in the growth of a region and should be considered by a public agency *in appropriate situations*, the fact remains, as this comment has shown, that economic factors are clearly subordinate to environmental considerations. Furthermore, based on the statutory construction argument above, whatever role economic criteria play in CEQA, the consideration given these criteria in the Tulare Lake Model with respect to emergency exemptions, was unwarranted.

The Tulare Lake Model reveals that the emergency exemptions have been stretched beyond their intended use. The *Wildlife Alive*, *Myers*, and *City of Coronado* line of cases cautioned against this very type of abuse. By strictly enforcing the provisions of CEQA and implementing the notice and emergency exemption proposals outlined, the discretion now possessed by these agencies may be curtailed. Only then will the likelihood of continuing circumvention of CEQA through misuse of the emergency exemptions be reduced.

The Tulare Lake Pumping Project has largely followed the *letter* of CEQA. Whether the decision to exempt the project entirely from CEQA will result in the ecological catastrophe feared remains to be seen. In this sense, one must seriously question whether TLRD 749 complied with the *spirit* of the CEQA regulatory provisions.

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