

AFTERMAMMOTH: FRIENDS OF MAMMOTH AND THE AMENDED CALIFORNIA ENVIRONMENTAL QUALITY ACT

In the past four years state environmental legislation has often been overshadowed by more publicized federal enactments. However, much environmental degradation takes place beyond the reach of federal regulation. Several states have sought to fill this void by adopting legislation incorporating the environmental impact procedure of the National Environmental Policy Act. California did so in 1970, but its Environmental Quality Act remained quiescent until the state supreme court interpreted the Act to cover significant private as well as public projects. This Comment examines that controversial opinion and the subsequent legislative amendment of the California Environmental Quality Act. Based on the strong policy justifications favoring environmental protection advanced by the court, the author argues that the Act's new provisions must be given a liberal judicial and administrative interpretation.

From its enactment on November 23, 1970, the California Environmental Quality Act (CEQA)¹ had been interpreted by state and local agencies to mandate an Environmental Impact Report (EIR) only for public works which might create a significant impact on the environment. On September 21, 1972, the California supreme court, in *Friends of Mammoth v. Board of Supervisors of Mono County*,² declared that CEQA also required governmental agencies to submit an EIR for private activities of significant impact which they permit or entitle.³

The far-reaching decision caused an immediate reaction. Local governments stopped granting building permits,⁴ banks held up loans, and contractors voiced fears of a disastrous impact on the state's economy.⁵ Although the court's intemperate equation of "significant" with

1. CAL. PUB. RES. CODE §§ 21000 *et seq.* (West Supp. 1973). For CEQA as originally enacted see ch. 1433, § 1, [1970] Cal. Stat. 2780.

2. 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761, 4 ERC 1705, *modifying* 8 Cal. 3d 1, 500 P.2d 1360, 104 Cal. Rptr. 16, 4 ERC 1593 (1972).

3. 8 Cal. 3d at 259, 502 P.2d at 1056, 104 Cal. Rptr. at 768, 4 ERC at 1597.

4. L.A. Times, Oct. 1, 1972, § C, at 8, col. 1. *See also* the affidavits of city and county officials included in appendices 1-20 to Respondents' Petition for Rehearing (Oct. 6, 1972). Cities also were issuing building permits with "disclaimers" limiting their liability as to the validity of the permit. L.A. Times, Nov. 4, 1972, § I, at 30, col. 1.

5. S.F. Chronicle, Oct. 26, 1972, at 9, col. 1. *See also* Wall St. J., Oct. 9, 1972, at 22, col. 1 (Pac. ed.). As this article points out, substantial disagreement existed

"nontrivial"⁶ provoked concern that nearly all projects would require EIR's, the reaction was hyperbolic.⁷ In fact, cities and counties soon resumed granting building permits,⁸ and the more sophisticated among them were enacting guidelines to effectuate the newly mandated EIR procedures.⁹ On November 6, 1972, the state supreme court filed a modification of its opinion. The court reinterpreted "significant" as encompassing only the minority of projects,¹⁰ but it refused to rehear the case or to grant a moratorium on the implementation of the EIR requirement for private projects.¹¹ These adjustments were too little

as to whether the construction industry would be harmed significantly. Better builders already were in the practice of making studies similar to the EIR. Friends of *Mammoth*, therefore, would require only that all builders be subject to the same requirements. A Security Pacific Bank real estate analyst reported that the number of building permits taken out and the number and value of construction starts mushroomed in October. *Daily Pacific Builder*, Dec. 20, 1972, at 1, col. 3. Much of this activity undoubtedly was spurred by the anticipated relief bill (Assembly Bill 889) then pending in the Legislature.

6. 8 Cal. 3d at 24 n.10, 500 P.2d at 1376 n.10, 104 Cal. Rptr. at 32 n.10, 4 ERC at 1603 n.10.

7. Thomas Willoughby, principal consultant to the California Assembly Committee on Local Government, called the reaction "nicely orchestrated public hysteria." He cited as examples the prediction by the state chamber of commerce of an end to construction within six months, the Lieutenant Governor's statement that even drivers' licenses would require impact statements, and legal advice to cities and counties that they should stop granting all building permits. These were perhaps part of a trial balloon to ascertain whether support could be mustered to cause a complete rollback of CEQA. Keynote address at the California Environmental Impact Law Conference, University of California, Davis, Apr. 7, 1973, Transcript of Proceedings at 7-9 [hereinafter Impact Conference]. See also *S.F. Chronicle*, Oct. 10, 1972, at 5, col. 4.

8. *S.F. Chronicle*, Oct. 6, 1972, at 1, col. 1. Many of the permits for larger projects still were being granted with "disclaimers." See note 9 *infra*.

9. Los Angeles' Interim Guidelines reduced by 85 percent the number of building permits granted with "disclaimers." The city council did not proceed to adopt final guidelines because of the legislation to clarify CEQA then pending. *L.A. Times*, Nov. 4, 1972, § I, at 30, col. 1. See also *Sacramento Bee*, Nov. 23, 1972, § A, at 16, col. 1.

Prior to *Friends of Mammoth*, certain agencies doing public works were not abiding by the dictates of CEQA. The scope of the decision was, however, ample publicity for CEQA's application to public projects and required even previously complying agencies to expand the procedural requirements for public projects. Interview with James Cutler, Contra Costa County Planning Dep't, Martinez, Cal., Oct. 20, 1972.

10. 8 Cal. 3d at 272, 502 P.2d at 1065, 104 Cal. Rptr. at 777, 4 ERC at 1705.

11. *Id.* at 272-73, 502 P.2d at 1065-66, 104 Cal. Rptr. at 777-78, 4 ERC at 1706. The Court reasoned that CEQA had been in effect for twenty-two months, that agencies should have had a procedure for public projects under CEQA, and that private projects could be grafted onto this without great effort. Agencies should have been on notice that the inclusion of private projects was imminent. In the first place, the legislature in 1971 required that agencies reject subdivision maps if the related projects would cause substantial environmental damage. See note 160 *infra*. Secondly, bills were pending in the legislature to clarify CEQA's application to private projects. Finally, the fact the state supreme court ignored the status quo by granting review and ordering the stay illustrated that some justices were intrigued by the Attorney General's broad reading of CEQA. See note 30 and accompanying text *infra*.

and too late. Pessimism about the economic impact of the decision and uncertainties in the procedure for permitting private projects had created an anti-*Friends of Mammoth* momentum.¹² This pressure used Assembly Bill 889 (A.B. 889), a proposal to amend and clarify CEQA then pending in the Senate,¹³ as a vehicle for substantial amendments to CEQA. Conservationists opposed many of the amendments, and final compromise sessions prevented any permanent weakening of CEQA. A.B. 889 was passed as an emergency measure¹⁴ in the closing hours of the legislative session. It necessitates a new look at CEQA and its interpretation in *Friends of Mammoth*.

This Note first examines the *Friends of Mammoth* decision, focusing particularly on the public policy rationales for the decision. It then turns to the broader implications of *Friends of Mammoth*. This discussion concentrates on CEQA as amended by A.B. 889 and analyzes two important aspects, judicial review and CEQA's planning function, which will determine CEQA's future application throughout the state.

I

THE BACKGROUND

A. *The California Environmental Quality Act*

CEQA establishes a complex procedure to force all public agencies to consider within their planning processes comprehensive information concerning the environmental impact of proposed projects and ways to avoid apparent adverse impact. The first chapter of CEQA declares the legislative policy and intent in fourteen statements emphasizing the necessity of restoring, preserving, and enhancing the environment.¹⁵ The remaining chapters set forth the procedure for effectuating this policy.¹⁶ The essential procedural tool of these implementation chapters is the Environmental Impact Report (EIR), a detailed,

12. S.F. Examiner, Nov. 12, 1972, § A, at 3, col. 1. See note 7 *supra*. However, the major newspaper in the state supported the court's decision, accepting the logic of looking at the whole, and not merely part, of the environmental problem. Editorial, L.A. Times, Oct. 3, 1972, § II, at 6, col. 1.

13. A.B. 889, Assembly Final History, Cal. Legis. Reg. Sess. (1972).

14. Ch. 1154, § 19 [1972] Cal. Stat. 204-05; 1972 WEST'S CAL. LEGIS. SERV. 2647.

15. CAL. PUB. RES. CODE §§ 21000-01 (West Supp. 1973). *E.g.*,

[I]t is the intent of the Legislature that all agencies of the state government which regulate activities of private individuals, corporations, and public agencies which are found to affect the quality of the environment, shall regulate such activities so that major consideration is given to preventing environmental damage.

Id. § 21000(g).

16. Ch. 1433, § 1, [1970] Cal. Stat. 2780, *as amended* CAL. PUB. RES. CODE §§ 21060-21174 (West Supp. 1973).

comprehensive statement analyzing the environmental impact of a project which may significantly affect the environment and the alternatives that lessen or eliminate any negative impact.¹⁷

CEQA was inspired by the National Environmental Policy Act of 1969 (NEPA),¹⁸ which mandates similar procedures for federal agencies.¹⁹ CEQA's authoring committee, the Assembly Select Committee on Environmental Quality, was created seven days after NEPA was signed into law.²⁰ Only two months later, the Committee submitted CEQA and other environmental proposals to the Speaker of the Assembly.²¹ CEQA was passed with little dissent by both houses on August 21, 1970, and took effect on November 23, 1970.²² Both the initial proposal and the final product unmistakably were patterned on NEPA.²³

CEQA was an imbalanced act, its policy chapter full of environmental hosannas contrasting starkly with the thin and prosaic procedural chapters. It is apparent that the exact procedural ramifications of CEQA—in particular, its application to private projects—were not seriously discussed,²⁴ and the Act's procedural sketchiness reflected this. A degree of incompleteness or vagueness, however, should not vitiate the general goals of such legislation. CEQA, like its progenitor NEPA, broke new ground. NEPA also was vague; its fleshing out was entrusted to the Council on Environmental Quality, the response of federal agencies, and the courts. Its boundaries still are being charted.²⁵ That CEQA was left to the same process of judicial and administrative definition should not be surprising.

17. The EIR has seven elements requiring detailed discussion: (a) the environmental impact of the proposed action; (b) any adverse environmental effects which cannot be avoided if the proposal is implemented; (c) mitigation measures proposed to minimize the impact; (d) alternatives to the proposed action; (e) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; (f) any irreversible environmental changes which would result from the proposed action, if implemented; and (g) the growth-inducing impact of the proposed action. CAL. PUB. RES. CODE § 21100 (West Supp. 1973). The seventh element was added by ch. 1154, § 2.5 [1972] Cal. Stat. 196.

18. 42 U.S.C. §§ 4321 *et seq.* (1970).

19. The Federal Environmental Impact Statement (EIS), *id.* § 4332(c), is the same as the California EIR (see note 17 *supra*) except that elements (c) and (g) are only expressly included in CEQA.

20. NEPA was signed by the President on January 1, 1970.

21. See CAL. ASSEMBLY SELECT COMM. ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL BILL OF RIGHTS (1970) [hereinafter cited as CAL. ENVIR. BILL OF RIGHTS].

22. A.B. 2045, Assembly Final History, Cal. Legis. Reg. Sess. (1970).

23. See 8 Cal. 3d at 260-61 n.4, 502 P.2d at 1057-58 n.4, 104 Cal. Rptr. at 769-70 n.4, 4 ERC at 1597-98 n.4; Keith v. Volpe, 352 F. Supp. 1324, 1337, 4 ERC 1350, 1358 (C.D. Cal. 1972).

24. Willoughby address, Impact Conference, *supra* note 7, at 6. See also notes 62-64 *infra* and accompanying text.

25. See notes 116-18, 139-61 *infra* and accompanying text. See also N.Y. Times, Oct. 16, 1972, at 12, col. 2 (Pac. ed.).

The principal uncertainty in CEQA was the definition of the word "project," the governmental activity which requires an EIR. The Office of Planning and Research,²⁶ the agency charged with issuing guidelines for CEQA,²⁷ defined "project" as public work,²⁸ and virtually all public agencies had been operating under this same definition.²⁹ This was contested formally by the Office of the Attorney General, which argued that "project" also included private activity conducted pursuant to a government permit or entitlement of use.³⁰ In the midst of this controversy, and with final CEQA guidelines still unpublished, the *Friends of Mammoth* case reached the supreme court.

B. History of the Case

Mammoth Lakes is a mountain village situated at the base of Mammoth Mountain, a major ski area on the eastern slope of the Sierra Nevada. Due to this combination of beauty and business opportunity, Mammoth Lakes has been abused by the environmental heresy of rapid, unplanned growth.³¹

On April 20, 1971, International Recreation, Ltd., filed a request with the Mono County Planning Commission for a conditional use permit to build a series of condominiums. Pursuant to notice the planning commission held a hearing and granted the permit. Various residents, but not plaintiff Griffin, appealed the decision to the Mono County Board of Supervisors. After a hearing the supervisors upheld the decision of the planning commission on June 14, 1971.³²

26. Established by CAL. GOV'T CODE § 65030 *et seq.* (West Supp. 1973).

27. *Id.* § 65040. See ch. 1433, § 1, [1970] Cal. Stat. 2780 (codified at CAL. PUB. RES. CODE § 21103 (West Supp. 1972), as amended CAL. PUB. RES. CODE § 21083 (West Supp. 1973)). The state Resources Agency adopted and signed the guidelines because it was felt that an operating line agency, and not a staff research agency, should be ultimately responsible for the guidelines. Letter from Norman E. Hill, Cal. Resources Agency, to the author, Oct. 17, 1972. This was not based on statutory authority. The amended version of CEQA, however, assigns final review and responsibility to the Secretary for Resources. CAL. PUB. RES. CODE § 21083 (West Supp. 1973).

28. CAL. RESOURCES AGENCY, PROPOSED GUIDELINES FOR THE PREPARATION AND EVALUATION OF ENVIRONMENTAL IMPACT STATEMENTS UNDER THE CAL. ENVIRONMENTAL QUALITY ACT OF 1970 at 2 (June 21, 1971); CAL. RESOURCE AGENCY, INTERIM GUIDELINES FOR THE PREPARATION AND EVALUATION OF ENVIRONMENTAL IMPACT STATEMENTS UNDER THE CAL. ENVIRONMENTAL QUALITY ACT OF 1970 at 1, 4 (Draft, Apr. 28, 1972) [hereinafter cited as INTERIM GUIDELINES].

29. See Willoughby, Impact Conference, *supra* note 7, at 6.

30. Petition of the Cal. Att'y Gen., *In re Proposed Guidelines for the Preparation and Evaluation of Environmental Impact Statements Under the Cal. Environmental Quality Act of 1970*, at 9-20 (Sept. 3, 1971).

31. Fradkin, *Mammoth Area: Scenic Paradise or Urban Blight?* L.A. Times, Aug. 23, 1971, § I, at 1, col. 1, reprinted in Opening Brief for Appellant, App. B, at 2-9.

32. Brief for Respondents at 3.

On July 12 plaintiffs Friends of Mammoth, an unincorporated association, and Griffin, representing the class of property owners within 300 feet of the lot in question, filed a petition for administrative mandamus in the state court of appeal, asserting, *inter alia*, that CEQA applied to private activities such as the planned condominiums.³³ The petition was denied without prejudice on the 31st day of a 30-day zoning appeal statute of limitations.³⁴ Four days later petitioners filed an identical petition in the Superior Court of Mono County. This request for a writ of mandate also was denied.³⁵ Friends of Mammoth appealed this disposition and requested an order staying action by International Recreation pursuant to the conditional use and building permits granted by Mono County. When this request was denied, petitioners asked the supreme court to take jurisdiction and decide the case on its merits. On January 13, 1972, the California Supreme Court granted the petition for a hearing and stayed all activities of the developer.³⁶

II

THE DECISION

The supreme court decided four issues. Two of these involved procedural defenses pleaded by respondents and the developer. First, respondents claimed that appellant Griffin, the named representative of the class, had not exhausted his administrative remedies, and therefore lacked standing to sue.³⁷ The court held, in an important ruling on standing in class actions, that the function of the exhaustion doctrine had been fulfilled through the appearance of other members of the class.³⁸

33. Appellants' Petition for Administrative Mandamus (filed July 12, 1972), at 2 & 6. See also the attached Memorandum of Points and Authorities, at 15-17.

34. Brief for Respondents at 12.

35. *Id.* at 4.

36. *Id.* Under CAL. SUP. CT. R. 20, the supreme court can transfer to itself any case then residing in a court of appeal below.

37. Brief for Respondents at 9-11.

38. 8 Cal. 3d at 268, 502 P.2d at 1063, 104 Cal. Rptr. at 775, 4 ERC at 1601. At the very least, the previous law pertaining to standing to bring a class action would have required Griffin to join as a plaintiff in this action one member of the class which had exhausted its remedies. In *La Sala v. American Savings & Loan Ass'n*, 5 Cal. 3d 864, 489 P.2d 113, 97 Cal. Rptr. 849 (1971), plaintiff initially was a member of the class and brought the suit in that capacity, only to be later disenfranchised from the class without fault. The court held that the cause of action was properly brought and needed to be amended only by the naming of a still active member of the class. 5 Cal. 3d at 875-76, 489 P.2d at 1119-20, 97 Cal. Rptr. at 855-56. In *La Sala* the plaintiff did have standing initially. This fact was emphasized in a subsequent state court of appeal decision in which the plaintiff was not permitted to amend the complaint by substituting another party. *Payne v. United California Bank*, 23 Cal. App. 3d 850, 857-58, 100 Cal. Rptr. 672, 677 (1st Dist. 1972). The plaintiff there was deemed not to be a member of the initial class represented. In *Friends of Mam-*

The second argument was that judicial review had not been sought within the time limit set by the Mono County Ordinance.³⁹ The court, however, replied that requesting the writ in the first instance in the court of appeals and being denied "without prejudice" gives constructive notice and tolls the statute of limitations if the writ is promptly refiled in superior court.⁴⁰ These determinations cleared the stage for consideration of the primary issue in controversy.

A. The Central Issue: Unraveling the Statutory Phrase

The third and major issue before the court was whether CEQA required the local governing body to prepare an EIR before granting a permit for private activity.⁴¹ Argument focused on the statutory meaning of the phrase "project they intend to carry out," particularly as that definition related to the scope and avowed purpose of CEQA and to the definition of "project" in the Federal Interim Guidelines for NEPA.⁴²

Although the word "project" was used throughout CEQA as the general catchword for governmental activity, the particular section on which argument centered was section 21151:

The legislative bodies of all cities and counties which have an officially adopted conservation element of a general plan shall make a finding that any project they intend to carry out, which may have a significant effect on the environment, is in accord with the conservation element of the general plan. All other local governmental agencies shall make an environmental impact report on any project they intend to carry out which may have a significant effect on the environment and shall submit it to the appropriate local planning agency as part of the report required by Section 65402 of the Government Code.⁴³

The conservation element is the part of the general plan of a city

moth, Griffin was a member of the class aggrieved, but not of the more select class of persons who also had appealed to the Board of Supervisors. *Payne* and *La Sala* remain good law, and in looking only to the adequate exhaustion of remedies, the supreme court emphasized both Griffin's stance as a private attorney general and a liberal policy of standing under CEQA.

39. Brief for Respondents at 12-14.

40. 8 Cal. 3d at 268-69, 502 P.2d at 1063-64, 104 Cal. Rptr. at 775-76, 4 ERC at 1601-02.

41. Brief for Appellants at 9-19; Brief of the Cal. Att'y Gen. at 15-26; Brief for the Sierra Club as Amicus Curiae at 13-37.

42. 35 Fed. Reg. 7390 (1970). See Brief of the Cal. Att'y Gen. at 20-24; Brief for the Sierra Club as Amicus Curiae at 28-29.

For another view of the court's interpretation of CEQA, see Note, *Duty of Private Parties to File Environmental Statement*, 61 CALIF. L. REV. 559 (1973).

43. Ch. 1433, § 1, [1970] Cal. Stat. 2783, as amended CAL. PUB. RES. CODE § 21151 (West Supp. 1973).

or county containing policies and standards for preserving, enhancing, and utilizing natural resources.⁴⁴ The 1970 legislature made it a mandatory element and set a deadline of July 1, 1972, for compliance.⁴⁵ Mono County, however, did not have a conservation element at any time during the litigation. Therefore, only the second sentence of section 21151 could apply.

Both the majority and the dissent⁴⁶ saw the second sentence in section 21151 as an alternative to the first; *i.e.*, lacking a conservation element against which to test a proposed project, a city or county would have to prepare an EIR as the method of disclosing and considering the project's environmental impact on the community.⁴⁷ However, in implementing this environmental evaluation by either the conservation element or an EIR, the question remained whether the statutory phrase "project they intend to carry out" included private activity for which a governmental permit or entitlement for use is necessary.⁴⁸

44. CAL. GOV'T CODE § 65302(d) (West Supp. 1973).

45. Ch. 717, § 3, [1970] Cal. Stat. 1345. The date of compliance has subsequently been changed to Dec. 31, 1973. Ch. 120 [1973] Cal. Stat. 145, DEERING'S CAL. LEGIS. SERV.

46. Justice Sullivan dissented from the majority opinion.

47. It was not clear that the second sentence was to be an alternative to the first. Robert Jones, special consultant to the Select Committee, stated he thought the intent was to give the cities and counties a year or so of grace while they created their conservation elements, and that the second sentence applied only to special districts. *Hearings on the Administration of the Environmental Quality Act of 1970 and Related Acts of the Senate Comm. on Natural Resources* at 7, Cal. Legis. Reg. Sess. (1970) [hereinafter cited as *1970 CEQA Hearings*]. That special districts were thought to be covered by § 21151 was concurred in by Charles L. Baldwin, consultant with the State Senate Comm. on Governmental Organization. Letter from Charles L. Baldwin to the author, Nov. 13, 1972. The dissenting opinion, however, goes out of its way to state that the second sentence does not include special districts but only cities and counties without conservation elements. 8 Cal. 3d at 276 n.3, 502 P.2d at 1068 n.3, 104 Cal. Rptr. at 780 n.3, 4 ERC at 1604 n.3. This disagreement is further evidence of the ambiguity of the Act.

The editing and amending of the Act added to this confusion. Whereas earlier versions of CEQA clearly showed that both cities and counties without conservation elements and special districts were covered, later amendments condensed the relevant two sentences into the one in the final draft. A.B. 2045, Cal. Legis. Reg. Sess. (*as amended* Aug. 4 & 14, 1970). This led to three possible readings: that only special districts were covered; that only cities and counties without conservation elements were covered; or that both were covered. The decision in *EDF v. Coastside County Water Dist.*, 27 Cal. App. 3d 695, 701-02, 104 Cal. Rptr. 197, 200 (1972), assumed that special districts were covered. The current amended version of CEQA expressly includes special districts. CAL. PUB. RES. CODE §§ 21062-63 (West Supp. 1973).

48. Under the planning and zoning statutes for local government, agencies would be required to regulate private projects in relation to the conservation element (as well as other environmental elements of the general plan). CAL. GOV'T CODE §§ 65302, 65860 (West Supp. 1973); see note 79 *infra* and accompanying text. Therefore, there would be more symmetry among the two pieces of legislation if "project" in section 21151 extended at least to zoning.

1. "Project They Intend to Carry Out"

The phrase "project they intend to carry out" is awkwardly worded, as was much of the Act, and becomes more ambiguous when considered in the context of CEQA and its history. Both the majority and dissent can cite ample authority to support their interpretations of the phrase. The divergence stems from their differing conclusions on the intent of CEQA, findings made more difficult due to the lack of published committee hearings and floor debate. The controversy boils down to the dissent's limiting itself to a conservative reading of the Act and the majority's resolving the ambiguity in favor of broad policy considerations.

The majority discarded dictionary definitions and conflicting affidavits as unrevealing, and looked to the intent chapter, finding there an expansive policy of environmental protection demanding a broad reading of "project they intend to carry out."⁴⁹ It provided support for this conclusion by reference to the federal interim guidelines for NEPA published while CEQA was in committee; they define "project" to include actions requiring permits and other entitlements for use, and the majority used this to explain away the possibly narrowing change from the operative word "program" in initial CEQA drafts to the final word "project."⁵⁰

The dissent's analysis emphasized the discrepancy between the environmental homilies of the policy chapter and the limited procedures of the operative chapters. It maintained that statutory construction must begin with the words themselves and that the phrase "project they intend to carry out" manifestly meant the undertaking of a public works project by a public agency.⁵¹ The dissent felt the NEPA Guide-

49. 8 Cal. 3d at 256-60, 502 P.2d at 1054-57, 104 Cal. Rptr. 766-69, 4 ERC at 1595-97.

50. 35 Fed. Reg. 7390-91 (1970). 8 Cal. 3d at 260-62, 265, 502 P.2d at 1057-58, 1060-61, 104 Cal. Rptr. at 769-70, 772-73, 4 ERC at 1597-98, 1600.

51. 8 Cal. 3d at 274-75, 502 P.2d at 1067-68, 104 Cal. Rptr. at 779-80, 4 ERC at 1603-04.

Section 21151 (ch. 1433, § 1, [1970] Cal. Stat. 2783, *as amended* CAL. PUB. RES. CODE § 21151 (West Supp. 1973)) required that an EIR be included with the report required by Gov't CODE § 65402 (West Supp. 1973), which directs public agencies to file a report on their proposed real estate transactions and construction projects with all planning agencies having concurrent jurisdiction. The dissent used this as evidence that "project" is limited to public works construction or real estate transactions. 8 Cal. 3d at 276-77, 502 P.2d at 1069, 104 Cal. Rptr. at 781, 4 ERC at 1604-05. However, the section 65402 procedure is more limited than the category of "public works" projects. To restrict "project" to the narrow parameters of section 65402 would mean, for example, that a water district could lease a million acre-feet of water to a corporation or a particular public agency, thus seriously limiting the available supply to the surrounding area, and yet would have to file an EIR only for

lines were inconclusive and proceeded to distinguish them.⁵² It pointed out how the amending process had narrowed the scope of CEQA, and concluded that the legislative history demonstrated that only public works were to be covered.⁵³

The statutory phrase is not as clear on its face as the dissent asserts. The word "project" is used in several different contexts within the body of the Act⁵⁴ and, as the majority noted, is interchanged with the admittedly broader word "action."⁵⁵ If "project" meant simply "public work," the substitution would have been simple enough. Rather, "project" is expansive in its possible meanings, and could denote planning,⁵⁶ which in turn may include regulation of private activity.⁵⁷ In addition, the phrase "they intend to carry out," although awkward, was used in earlier drafts of CEQA to modify the subjects "program" and "change in zoning," both of which admittedly connote regulation of private activity.⁵⁸ Given this ambiguity, the majority is justified in looking to the overall context for the word's meaning.⁵⁹

On the other hand the majority's use of the federal guidelines to define "project" is unconvincing. First, there is no reason to believe that the guidelines were before the committees in which the word

the aqueduct built to deliver the water—and then only if the aqueduct were large enough to have a significant effect on the environment. Brief for the Sierra Club as Amicus Curiae at 45-50. The long-term lease is certainly as much a "public" project as a section 65402 real estate transaction. This discrepancy suggests that the intent of the link between section 65402 and CEQA section 21151 was to incorporate the EIR into existing inter-agency review processes where possible. See 1970 CEQA Hearings, *supra* note 47, at 4.

52. 8 Cal. 3d at 281-83, 502 P.2d at 1072-73, 104 Cal. Rptr. at 784-85, 4 ERC at 1607-08.

53. *Id.* at 279-81, 286, 502 P.2d at 1070-72, 1075, 104 Cal. Rptr. at 782-84, 787, 4 ERC at 1606-07, 1609-10. See A.B. 2045, Cal. Legis. Reg. Sess. (1970); see also 1970 CEQA Hearings, *supra* note 47, at 4.

54. "[F]ederal project." § 21101. ". . . [A]ny project, other than a project involving only planning . . ." § 21102. "State agencies . . . responsible for allocating funds on a project-by-project basis to local governmental agencies for land acquisition or construction projects . . ." § 21150. Ch. 1433, § 1, [1970] Cal. Stat. 2780, as amended CAL. PUB. RES. CODE §§ 21102, 21150 (West Supp. 1973).

In earlier legislation, "project" had been used to denote a private condominium project. CAL. CIV. CODE § 1350 *et seq.* (West Supp. 1973). See also CAL. BUS. & PROF. CODE § 11535.1 (West Supp. 1973).

55. 8 Cal. 3d at 262 & n.5, 502 P.2d at 1058 & n.5, 104 Cal. Rptr. at 770 & n.5, 4 ERC at 1598 & n.5.

56. The dissent accepts this point. 8 Cal. 3d at 280-81, 502 P.2d at 1072, 104 Cal. Rptr. at 784, 4 ERC at 1607.

57. See note 48 *supra*.

58. 8 Cal. 3d at 279-81, 502 P.2d at 1071-72, 104 Cal. Rptr. at 783-84, 4 ERC at 1606-07.

59. *People ex rel. San Francisco Bay v. Town of Emeryville*, 69 Cal. 2d 533, 543-44, 446 P.2d 790, 796-97, 72 Cal. Rptr. 790, 796-97 (1968).

changes were made.⁶⁰ Second, analysis of the federal guidelines gives ambivalent results. The dissent's point is well made that "project they intend to carry out" is more nearly comparable with the federal guidelines' subsection "projects . . . [d]irectly undertaken by . . . agencies" within the section "projects and continuing activities" than with that section taken as a whole.⁶¹ The federal guidelines, however, do indicate that the word "project" may have a broad meaning.

Better evidence of the expansive intent of CEQA and of the word "project" comes from the statutory mandate to the Office of Planning and Research (O.P.R.) to develop guidelines for CEQA. This mandate states, in language parallel to section 21103 of CEQA,⁶² that the O.P.R. shall:

(g) Coordinate, in conjunction with appropriate state, regional, and local agencies, the development of objectives, criteria and procedures for the orderly evaluation and report of the impact of public and *private actions* on the environmental quality of the state⁶³

This section was not before the court, but it deserves consideration, since it was being amended concurrently with CEQA and was passed on the same day.⁶⁴ It suggests that either the legislature was uncertain of its own intentions about the scope of CEQA, or it avoided a difficult resolution through purposeful ambiguity in CEQA's operative language.

60. State Senator Randolph Collier stated that the "federal legislation" was not before the Finance Committee at the time of its hearings on A.B. 2045 (CEQA). Letter from Senator Collier to the author, Nov. 16, 1972. The understanding of Senator Collier during the hearings was that private building was not covered by CEQA. *Id.* The change from "program" to "project", however, was made in the Senate Committee on Governmental Organization, of which Senator Collier was not then a member. The author received no responses to inquiries to members of the latter committee.

61. 8 Cal. 3d at 282-83, 502 P.2d at 1073, 104 Cal. Rptr. at 785, 4 ERC at 1607-08.

62. Ch. 1433, § 1, [1970] Cal. Stat. 2780.

63. CAL. GOV'T CODE § 65040(g) (West Supp. 1973) (emphasis supplied). It continues: ". . . and as a guide to the preparation of environmental impact reports required of state and local agencies in Sections 21102 and 21150 of the Public Resources Code." (Another verb, such as "serve," is needed in this second part of the conjunctive sentence to make it grammatically correct.)

This conjunctive sentence expresses two different ideas; the second section in this footnote does not limit the first section quoted in the text. Impact reports are required of state agencies in more instances than those listed in sections 21102 and 21150 (e.g., §§ 21100, 21151). Therefore, the section as a whole means that the O.P.R. had—and may still have—a more direct function in those instances (*i.e.*, those mandated by sections 21102 and 21150) where a state agency, board, or commission authorizes funds to another agency of the state. In other instances, the O.P.R. had the more limited duty of preparing guidelines in conjunction with other state, regional, and local agencies for their actions affected by CEQA requirements.

64. A.B. 2045 [CEQA] and A.B. 2070, Assembly Final History, Cal. Leg. Reg. Sess. (1970). Both bills were introduced by the Select Committee on Environmental Quality.

2. *Disputed Intent and History of CEQA*

Because of the uncertainty of the statutory language, the analysis used by both opinions depends crucially on the intent of the Act. The majority revealingly prefaced its interpretation with a recital of the need for strong environmental legislation and then pointed to the first chapter's statements of intent to regulate private activity⁶⁵ as a clear manifestation of the wide scope that should be given the contested phrase. To refute the evidence of apparent intent, the dissent went to the legislative history of the Act. The change from "program" to "project" as the government activity keying the EIR procedure of CEQA and the dropping of "change in zoning" both strongly suggested a more limited scope.⁶⁶ Moreover, CEQA might not have been enacted so easily had it been thought that permits for private activity were subject to its procedure.⁶⁷

The majority attempted to counter the amendment argument by skirting the deletion of "change in zoning" and focusing on the expansive use of "project" in the federal guidelines. It interpreted the change from "program" to "project" as a limitation from "more general planning, and policy and procedure-making" to the narrower field of "activities culminating in physical changes."⁶⁸ This distinction, particularly in the context of earlier footnotes implying that CEQA did not extend to general regulation,⁶⁹ put the majority opinion between Scylla and Charybdis: in order to avoid awkward language and history, the majority steered dangerously close to limiting CEQA to approval of individual "projects" at the expense of broader regulatory

65. *E.g.*, CAL. PUB. RES. CODE § 21000(g) (West Supp. 1973), quoted in note 15 *supra*.

66. 8 Cal. 3d at 279-81, 502 P.2d at 1071-72, 104 Cal. Rptr. at 783-84, 4 ERC at 1606-07.

67. 4 CAL. ASSEMBLY J. 8239 (Reg. Sess. 1970) (one "no"); 3 CAL. SENATE J. 5750 (Reg. Sess. 1970) (no "no" votes). A special assistant to the State Resources Agency stated that it was the intent and understanding of the Governor that CEQA not cover private projects. Letter from Norman E. Hill to the author, Oct. 17, 1972.

68. 8 Cal. 3d at 265, 502 P.2d at 1061, 104 Cal. Rptr. at 773, 4 ERC at 1600.

69. The court had noted, regarding the awkwardness of the "carry out" language [see text accompanying note 58 *supra*], that a project could more easily be seen as being carried out when an agency maintained regulatory control over the lifetime of the project. 8 Cal. 3d at 263 n.7, 502 P.2d at 1059 n.7, 104 Cal. Rptr. at 771 n.7, 4 ERC at 1598 n.7. The implication is that the agency is, in a sense, carrying out the individual project and ignores the obvious generalization that regulation itself is a project that the agency carries out with which all private projects must conform. [See text accompanying note 57 *supra*]. In addition, in dealing with CEQA's failure to incorporate "continuing activities" as well as "projects" from the federal guidelines [see text accompanying note 61 *supra*], the court replied that the former might continue for some unknown period of time while the latter's duration was relatively settled. *Id.* at 262 n.6, 502 P.2d at 1058 n.6, 104 Cal. Rptr. at 770 n.6, 4 ERC at 1598 n.6. Again, the activity distinguished suggests broader regulatory schemes.

legislation, which could also be termed a "project." The result was uncertainty whether CEQA covered zoning and other legislative regulation.⁷⁰ However, in adding the caveat on culmination in physical change, a possibility that zoning holds as much as does the conditional use ruled upon in the case, the court navigated through the statute and, prospectively, certainly would have excluded only the most generalized and unfocused planning.⁷¹ This interpretation is necessitated by the broad policy base of the opinion, the next subject of discussion.

3. *A Public Policy Reading of CEQA*

The foregoing interpretive arguments do not absolutely resolve CEQA's ambiguity. Due to the inconclusiveness of the court's interpretive arguments and the sense of environmental urgency that dominates the decision, it is the author's opinion that the determining influence in the majority decision was the need to read CEQA in such a manner as to insure its implicit goal of promoting open and comprehensive planning that seriously weighs long-term effects upon the environment. The legislature's statements of policy did invite a broad reading,⁷² and a series of three arguments provided the court with a persuasive perspective on what an environmental planning act such as CEQA must intend.⁷³

The first argument took the common sense approach that a governmental body should not be able to permit a private party to do what the government cannot do;⁷⁴ that is, build without the full environmental procedure mandated by CEQA. If this were the case, a public utility would have to file an impact statement for any "public works" proposed, yet a regulatory body such as the Public Utilities Commission would not be required to consider the environment at all before granting a permit for comparable "private works."⁷⁵ Such an ap-

70. Statement of the Attorney General before the Assembly Comm. on Local Gov't, Oct. 18, 1972, Anaheim, Cal., transcript at section 4(f). Respondents' Petition for Rehearing, Oct. 6, 1972, at 4.

71. Amended CEQA quite clearly covers legislative action (enactment of zoning), CAL. PUB. RES. CODE § 21080 (West Supp. 1973), and the state Guidelines extending this coverage to broader policy determinations like general plans. 14 CAL. ADMIN. CODE § 15037(a)(1) (1973). *But see* Bozung v. Ventura County Local Agency Formation Comm'n, *et al.*, Civil No. SP 46856 (Ventura County Super. Ct.), (Nov. 6, 1972) in which annexation was not considered "culminating in physical changes." See note 205 *infra*.

72. See, e.g., *Dickey v. Raisin Proration Zone No. 1*, 24 Cal. 2d 796, 802, 151 P.2d 505, 508 (1944).

73. Policy may aid in statutory construction; see *Freedland v. Greco*, 45 Cal. 2d 462, 467, 289 P.2d 463, 466 (1955); *In re Haines*, 195 Cal. 605, 613, 234 P. 883, 886 (1925).

74. Opening Brief for Appellants at 18.

75. A stronger case can be made that CEQA was meant to cover regulation of private activity by state agencies, such as the Public Utilities Commission. See

proach would allow both planning and environmental protection to be easily and arbitrarily evaded. Secondly, because private activity creates great public costs, any truly effective planning act must include private activity within its control.⁷⁶ One purpose of CEQA was to make public agencies more fully aware of the total residual effects, including the long-term environmental costs, of any project. If agencies are to avoid or modify environmentally costly projects to help protect the state's environment,⁷⁷ they must use the CEQA procedure to consider the public costs to the environment of permitting private projects. Thirdly, local agencies, which are many and fragmented in purpose and jurisdiction, generally consider only their own parochial interests in making decisions.⁷⁸ CEQA, along with other acts of the 1970 legislature, was designed to force local decisionmakers both to plan for the environmental needs of their constituencies and to consider the effect of a project on adjoining areas.⁷⁹ The develop-

statement of Robert Jones, special consultant to the Select Comm., at 8 Cal. 3d at 258 n.3, 502 P.2d at 1056 n.3, 104 Cal. Rptr. at 768 n.3, 4 ERC at 1596 n.3. However, once this is accepted, it is difficult to avoid the logical parallel between sections 21100 and 21151. If regulation of private activity is included in the former, there certainly were no clues that it would not be included in the latter.

76. Brief for the Sierra Club as Amicus Curiae at 34-37. These costs were noted in CAL. ENVIR. BILL OF RIGHTS, *supra* note 21, at 14-18, 29-30; CAL. LEGIS. JT. COMM. ON OPEN SPACE LAND, FINAL REPORT Cal. Legis. Reg. Sess. 8 (1970). See also Comment, *Recent California Planning Statutes and Mountain Area Subdivisions: The Need for Regional Land Use Control*, 3 ECOLOGY L.Q. 107, 108-13 (1973).

77. If a project is designed to take advantage of free resources, such as air, then the public and the environment will pay the cost, as in air pollution. An object of environmental planning should be to have projects redesigned to not put a burden on these unpriced resources, *i.e.*, have the project pay for or internalize this cost. For an introduction to this concept in an analagous context, see Note, *The Cost-Internalization Case for Class Actions*, 21 STAN. L. REV. 383 (1969).

In line with the doctrine that private activity creates public costs which the public should be able to regulate or recoup, the court recently held that a local government could exact either land dedication or a fee from a subdivider to create recreational or open space areas needed as a result of the development. *Associated Home Builders, Inc. v. City of Walnut Creek*, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630, 2 ERC 1491 (1971).

78. Brief for the Sierra Club as Amicus Curiae at 32-33. CAL. ENVIR. BILL OF RIGHTS at 18. The reality of possible corruption, or at least hyper-sensitivity to pressure from interested parties, in the area of local land-use regulation was presented clearly in a committee report on a related environmental issue. OPEN SPACE REPORT, *supra* note 76, at 42-47, 59, 100-01.

79. Brief for Sierra Club as Amicus Curiae at 39-45. See, *e.g.*, Ch. 1433, § 1, [1970] Cal. Stat. 2780, as codified CAL. PUB. RES. CODE § 21100(g) (West Supp. 1973) and as amended *id.* §§ 21104, 21151, 21154.

The 1970 state legislature passed strong legislation for the preservation of open space and agricultural land. CAL. GOV'T CODE §§ 65560-70, 65910-12 (West Supp. 1973). Strict procedures were established to insure compliance with the legislature's mandate—*e.g.*, *id.* § 65911 (zoning)—including the threat of invalidating building permits if they are inconsistent with the open-space plan. *Id.* § 65567.

This open space lands act was incorporated in strengthened provisions for local

ment of this type of complete record would minimize the vagaries of political pressure, bureaucratic habit, or lack of concern.⁸⁰ Since granting permits for private activity is a large part of this parochial process, it too must be rationalized within CEQA.

In line with these arguments the court found it "undisputed that the legislature intended that environmental considerations play a significant role in governmental decisionmaking."⁸¹ It follows that "to limit the operation of [CEQA] solely to what are essentially public works projects would frustrate the effectiveness of the act."⁸² This is the thrust of the decision: comprehensive environmental planning cannot be effective if there exists a practical discrepancy in the treatment of public as opposed to private use of land and resources. In drawing this broad policy base for CEQA, the court adds—in partial response to Mono County's assertion that environmental issues had been "taken into consideration"⁸³—that CEQA requires a new kind of decision-making process. Its essential elements are an in-depth and expository EIR, public participation in formulating the EIR and the final decision, and affirmative action by agencies in final project formulation and approval to pursue less environmentally damaging alternatives as revealed by the EIR process.⁸⁴ This strong policy interpretation given CEQA by the court, asserting environmental protection as a public policy, demands that a liberal interpretation be applied to the amended Act and guidelines promulgated under it in future litigation. This position is explored in the second chapter.

B. *The Written Findings Rule*

In *Broadway, Laguna Ass'n v. Bd. of Permit Appeals*, the California supreme court held that a zoning variance could be sustained only if the board had made findings which sufficed to establish compliance with all legal criteria and which were supported by substantial evidence in the record.⁸⁵ In the fourth argument ruled upon by the court in *Friends of Mammoth*, appellants pleaded that, independent of the applicability of CEQA, *Broadway, Laguna* reflected a new

planning. Most important among these provisions is the general plan, which now must include standards and objectives for several environmental factors. *Id.* § 65302. Zoning must reflect these objectives of the general plan. *Id.* § 65860. See Comment, *Mountain Subdivisions*, *supra* note 76, at 123-28.

80. See Brief for the Sierra Club as Amicus Curiae at 37, 43-45.

81. 8 Cal. 3d at 263, 502 P.2d at 1059, 104 Cal. Rptr. at 771, 4 ERC at 1599.

82. *Id.*

83. *Id.* at 263 & n.8, 502 P.2d at 1059 & n.8, 104 Cal. Rptr. at 771 & n.8, 4 ERC at 1599 & n.8.

84. *Id.* at 263 n.8, 502 P.2d at 1059 n.8, 104 Cal. Rptr. at 771 n.8, 4 ERC at 1599 n.8.

85. 66 Cal. 2d 767, 773, 427 P.2d 810, 814, 59 Cal. Rptr. 146, 150 (1967).

judicial concern not to treat land-use decisions by local bodies with the traditional presumption that they rested on necessary findings and supportive evidence, and, therefore, full and written findings should be required of Mono County to grant the conditional use.⁸⁶

The majority seized upon this pleading to expand the common law principle requiring written findings:

In light of the statewide concern expressed by the Legislature in the field of ecology, as evidenced by the EQA's impact report, the proper construction of the words "findings" or "found" requires a written statement of the supporting facts on which the agency has made its decision.⁸⁷

The reason for the majority's assertion of this principle may simply have been to create a parallel procedure for projects reviewed under the conservation element alternative in section 21151, guaranteeing respect for the "finding" and "accord" mandated by CEQA for all such projects which might have a significant impact.⁸⁸ But the majority's language was not so restrained, and there is no reason to believe the rule to be any more limited than the parameter "field of ecology." The majority elsewhere emphasized the requirement of a fully developed record under CEQA,⁸⁹ but here by "field of ecology"⁹⁰ the court presumably meant agency environmental determinations both within and without⁹¹ the bounds of CEQA. In requiring findings, the court is in agreement with federal courts which have recently ruled that agency responsibility in environmental determinations can best be insured by a full and written record.⁹²

86. Opening Brief for Appellants at 19-21. Precedent for this argument existed. The Second District Court of Appeal, citing *Broadway, Laguna*, had held that there can be no presumption of adequate findings where no written findings were made and the conditional use ordinance called for express findings. *Stoddard v. Edelman*, 4 Cal. App. 3d 544, 549, 84 Cal. Rptr. 443, 446 (2nd Dist. 1970). The Mono County Zoning Ordinance on use permits required a "finding" (8 Cal. 3d at 270, 502 P.2d at 1064, 104 Cal. Rptr. at 776, 4 ERC at 1602), and it is evident that the supreme court could have been remanded for express, written findings on this ground.

87. 8 Cal. 3d at 270, 502 P.2d at 1064-65, 104 Cal. Rptr. at 776-77, 4 ERC at 1603.

88. See text accompanying notes 43-45 *supra* and note 110 *infra*.

89. In *Friends of Mammoth*, the court emphasized that CEQA requires "concrete concepts" and not mere "vague or illusory assurances" that environmental factors have been taken into consideration. 8 Cal. 3d at 263 & n.8, 502 P.2d at 1059 & n.8, 104 Cal. Rptr. at 771 & n.8, 4 ERC at 1599 & n.8. See also note 146 *infra* and accompanying text.

90. It is apparent that the court used "field of ecology" in the popular sense of "environmental concern," e.g., "[t]he most recent declaration of the ecology ethic" 8 Cal. 3d at 254, 502 P.2d at 1053, 104 Cal. Rptr. at 765, 4 ERC at 1594.

91. See, e.g., CAL. BUS. & PROF. CODE 11526(c), 11526.1(b), 11538.1, 11549.5 (West Supp. 1973) (Subdivision Map Act); CAL. H. & S. CODE 24296 (West Supp. 1973) (variances for Air Pollution Control Districts).

92. *E.g.*, *EDF v. Ruckelshaus*, 439 F.2d 584, 2 ERC 1114 (D.C. Cir. 1971).

There are many policy reasons for requiring such findings. Forcing agencies to produce the basis of their decisions helps create a higher degree of administrative care⁹³ and facilitates judicial law enforcement by exposing the decision-making process and insuring that relevant factors are being taken into account.⁹⁴ Such considerations are particularly important in environmental legislation which places new responsibilities upon agencies.⁹⁵ Therefore, the court's abbreviated statement should be read as a broader policy directive than the particularized requirement of "findings" and "supportive facts."⁹⁶ The goal is to insure administrative care and to aid judicial review, and

Professor Kenneth Davis argues that both findings and reasons should be required for informal as well as formal administrative action. K. DAVIS, ADMINISTRATIVE LAW TEXT § 16.10 (1972). Agency action is "informal" if it is within that imprecise class of action which is neither adjudication nor rule-making or which is either of those if performed without the normal statutory procedure. For a more complete discussion, see Clagett, *Informal Action—Adjudication—Rule Making: Some Recent Developments in Federal Administrative Law*, 1971 DUKE L.J. 51. The building of highways, dams, and water projects, for example, is undertaken by informal agency action; thus informal action and its necessary common law restraints are the focus of much environmental litigation.

93. EDF v. Ruckelshaus, 439 F.2d at 598, 2 ERC at 1122.

Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper.

There is no assurance that an administrative agency has made a reasoned analysis if it need state only the ultimate finding of [the statutory standard].

California Motor Transport Co. v. Public Utilities Comm'n, 59 Cal. 2d 270, 275, 379 P.2d 324, 327, 28 Cal. Rptr. 868, 871 (1963).

94. EDF v. Froehlike, 473 F.2d 346, 351, 4 ERC 1829, 1833 (8th Cir. 1972); EDF v. Ruckelshaus, 439 F.2d 584, 595-98, 2 ERC 1114, 1120-22 (D.C. Cir. 1971); Broadway, Laguna, Ass'n v. Board of Permit Appeals, 66 Cal. 2d 767, 773, 427 P.2d 810, 814, 59 Cal. Rptr. 146, 150 (1967). See generally K. DAVIS, *supra* note 92, §§ 16.03, 16.09; K. DAVIS, ADMINISTRATIVE LAW TREATISE § 16.00 (Supp. 1970).

"Findings" is used to connote everything from basic evidence to ultimate facts, expressed in terms of the statutory standard. K. DAVIS, *supra* note 92, at § 16.04. In *Broadway, Laguna*, the Court used "findings" to include both the evidence and the ultimate findings. 66 Cal. 2d at 773, 427 P.2d at 814, 59 Cal. Rptr. at 150.

95. D. Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L.R. 612, 630 (1970) [hereinafter cited as Sive].

96. In areas of wide discretion, there may be no findings leading to legally justifiable or unjustifiable conclusions, such as the variance in *Broadway, Laguna*, but rather a set of basic facts and reasons upon which the agency will base its discretionary decision. Citizens Ass'n v. Zoning Comm'n, 477 F.2d 402, 408, 4 ERC 2063, 2066-67 (D.C. Cir., 1973). See K. DAVIS, *supra* note 113, §§ 16.01 and 16.07. (Findings, however, can be appropriate for some types of discretionary, legislative activity. See California Ass'n of Nursing Homes v. Williams, 4 Cal. App. 3d 800, 811, 84 Cal. Rptr. 590, 597 (3rd Dist. 1970); see also cases cited in note 169 *infra*; cf. CAL. GOV'T CODE § 65855 (West Supp. 1973).) A statutory delegation of discretion often will not contain the word "finding" or "found;" it should not be critical whether such words are in the statutory language but only whether there is a clear indication of legislative intent to have the agency or administrator take certain environmental criteria into account. Therefore, the better reading of the court's ruling in *Friends of Mammoth* is that in the field of environmental decisions a full, written exposition of facts and analysis contributing to the final decision should be made a part of the record.

the written record should include whatever basic evidentiary facts, findings, reasons, and course of analysis the agency uses.⁹⁷

III

ASSEMBLY BILL 889: AMENDED CEQA

Although initially the vehicle of the *Friends of Mammoth* backlash,⁹⁸ A.B. 889 as finally enacted represented a compromise between the building industry and the conservationists.⁹⁹ Its primary intent was to prevent a serious slowdown in construction industry activity and to avoid the confusion and possible inequities caused by the court's ruling.¹⁰⁰ The bill thus established a 120-day moratorium on the application of CEQA to private projects and a formula to determine the retroactivity of the *Friends of Mammoth* decision for private projects.¹⁰¹ Otherwise, A.B. 889's changes in CEQA are procedural—the important policy chapter remains intact. A.B. 889 formally shifts the primary responsibility of promulgating implementation guidelines from the Office of Planning and Research to the Office of the Secretary for Resources.¹⁰² It sets a statute of limitations for challenging agency action covered under CEQA¹⁰³ and exempts various types of emergency and disaster repairs,¹⁰⁴ ministerial projects,¹⁰⁵ and projects which are found to have no significant effect on the environment. This last group includes both projects given categorial exemptions¹⁰⁶ by the Secretary for Resources and individual agency decisions on particular projects.¹⁰⁷ A.B. 889 provides definitions, for terms such as "significant effect,"¹⁰⁸ and more clearly, although not adequately, de-

97. *EDF v. Froehke*, 473 F.2d 346, 351, 4 ERC 1829, 1833 (8th Cir. 1972); *Ely v. Velde*, 451 F.2d 1130, 1138, 3 ERC 1280, 1286 (4th Cir. 1971).

98. Letter from Assemblyman Paul Priolo to Lawrence McBride, *Ecology Law Quarterly* Board of Editors, Jan. 30, 1973.

For another discussion of A.B. 889, see C. Seneker, *The Legislative Response to Friends of Mammoth—Developers Chase the Will-o'-Wisp*, 48 CAL. STATE BAR J. 127 (1973) [hereinafter Seneker, STATE BAR J.]; see also Note, *Duty of Private Parties to File Environmental Statement*, 61 CALIF. L. REV. 559 (1973).

99. Willoughby, *Impact Conference*, *supra* note 7, at 9-11.

100. Letter from Assemblyman Kenneth Cory to the author, Jan. 23, 1973. Otherwise, Assemblyman Cory, who voted for A.B. 889, believes the state can prohibit projects which will be deleterious to the environment. *Id.*

101. CAL. PUB. RES. CODE §§ 21169-71 (West Supp. 1973).

102. *Id.* §§ 21083-84, 21086-87.

103. *Id.* § 21167.

104. *Id.* §§ 21085, 21172.

105. *Id.* § 21080(b). This section does not apply to ministerial functions such as the giving of notice.

106. *Id.* §§ 21084-86.

107. *Id.* § 21083.

108. *Id.*

lineates inter-agency responsibilities under the Act.¹⁰⁹ It also deletes the clause of section 21151 that exempted from the EIR requirement a city or county with a conservation element in its general plan.¹¹⁰

All these changes do not substantially alter the broad scope given to CEQA by the *Friends of Mammoth* decision. The Guidelines issued by the Secretary for Resources, however, often implement CEQA in a lackluster and ambiguous manner. The following discussion will demonstrate how two major aspects of amended CEQA—judicial review and comprehensive environmental planning—should be interpreted in light of *Friends of Mammoth* and other precedent, and, in particular, note failings of the present Guidelines in interpreting and implementing the Act.

A. Judicial Enforcement of CEQA

Because CEQA puts new burdens and responsibilities upon public agencies, there is certain to be a transition period in which citizens often will be calling upon the courts to review agency procedure and decisions covered by CEQA. This section discusses some areas in which judicial review will be often required, emphasizing both the applicable law and the appropriate judicial stance. It chronologically follows the EIR decision-making process: the threshold decision of whether an EIR is required, the legal adequacy of an EIR, and the considerations the agency must include in its final decision to approve or reject the project. It ends with a discussion of the standard of review the courts should use in reviewing substantive decisions of agencies.

1. Exemptions to Project Coverage by CEQA

a. Negative Declarations

An EIR need not be prepared for a proposed project which the agency correctly determines will not have a significant effect on the environment.¹¹¹ In lieu of the EIR the agency must prepare and issue

109. See notes 186-94 *infra* and accompanying text.

110. Ch. 1433, § 1, [1970] Cal. Stat. 2780, as amended CAL. PUB. RES. CODE § 21151 (West Supp. 1973). See text accompanying notes 43-45 *supra*. The conservation element exception had been seen as a major loophole in the protection provided by CEQA, and pro-development forces strangely did not contest its deletion.

111. CAL. PUB. RES. CODE § 21083 (West Supp. 1973).

The Guidelines define "significant effect" as "substantial adverse impact." 14 CAL. ADMIN. CODE § 15040 (1973). This definition not only is contradictory to CEQA's intent and legislative history (see Interim Guidelines, *supra* note 28, Part B, § 1, at 10) but also belies CEQA's comprehensive planning aspect. If the project may have a significant effect on the environment—perhaps even a beneficial effect—then an EIR must be prepared as a planning tool to assist the decisionmaker in

a Negative Declaration which contains this finding and later file a Notice of Determination that contains the finding and declares the agency determination to go ahead with the project.¹¹² The conclusion of no "significant effect on the environment" is a mixed question of law and fact: it involves applying the defined statutory terms—particularly "significant"—to the immediate facts.¹¹³ Analytically, it is for the agency to make all findings of fact and for the courts to take final responsibility for construing all terms of law.¹¹⁴ The question is not so easily resolved, however, and the problem is for the California courts to determine how active they will be in reviewing agency threshold determinations.

NEPA has a very similar threshold determination but gives no specific statutory guidance in determining the appropriate amount of judicial review.¹¹⁵ The federal courts' response has been varied with

formulating the most environmentally sound project. CEQA does not intend for the agency to avoid the EIR process by thinly documented conclusions at the threshold stage that the project will have no adverse effects. For a more complete discussion, see Cal. Att'y Gen., Supplementary Comments to Memorandum Entitled "Analysis of CEQA Guidelines Issued by the Resources Agency on February 5, 1973," at 1-6. Secondly, "substantial" means more than the statutory term "significant." "Substantial" suggests a high degree of harm (see BUS. & PROF. CODE § 11549.5(e) (West Supp. 1973)); setting the standard so high will prevent coverage of projects with possibly important environmental consequences.

112. 14 CAL. ADMIN. CODE § 15083 (1973); CAL. PUB. RES. CODE §§ 21083, 21108, 21152 (West Supp. 1973). The Guidelines state no reason for having the Negative Declaration be a separate document from a Notice of Determination for a project for which there has been found to be no possible significant effect. A function is served if the Negative Declaration is first reviewed for adequacy by the decision maker before the final decision and filing of the Notice of Determination. Public review might also be invited at this interval. (See Cal. Resources Agency, Proposed Amendments to Guidelines for Environmental Impact Reports, § 15083(a) (Aug. 31, 1973) [hereinafter cited as Proposed Amendments].) The Notice of Determination is the crucial document as the statute of limitations runs from the date of its filing. CAL. PUB. RES. CODE § 21167 (West Supp. 1973).

The Guidelines ignore the significance of the notification problem. Even the general notice sections (14 CAL. ADMIN. CODE § 15083 (1973)) do not take the further step of requiring the repositories of notice, the Secretary of Resources and the local county clerks, to post, publish or mail notice. An adequate solution is for local clerks and the Secretary: (1) to post in one prominent location all notices respecting CEQA (including notice that a draft EIR is being prepared) and (2) to mail this same list to citizens or organizations willing to pay the cost of mailing.

113. A question of law is one in which the only principle dispute relates to the meaning of the statutory term. A question of fact is one where the primary problem is the propriety of an administrative conclusion that raw facts undisputed or within the agency's power to find, fall under a statutory term as to whose meaning, at least, there is little dispute. *NLRB v. Marcus Trucking Co.*, 286 F.2d 583 (2d Cir. 1961).

114. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 548-51 (1965) (hereinafter cited as JAFFE). See Netterville, *Administrative "Questions of Law" and the Scope of Judicial Review in California*, 29 S. CAL. L. REV. 434 (1956).

115. See discussion in F. ANDERSON & R. DANIELS, NEPA IN THE COURTS—A

one line of authority having the court take the issue to itself and rule as a matter of law that an impact statement is required¹¹⁶ and another line applying an invigorated and scrutinizing "rational basis" test of the agency's threshold determination.¹¹⁷ In a third line of authority developed in *Hanly v. Kleindeinst*, the court divided the question analytically by having the agency produce detailed findings while leaving the legal inference of "significant" as a fully reviewable question of law.¹¹⁸

CEQA is more explicit than NEPA on the mechanics of the threshold decision and appears to favor an analytical division.¹¹⁹ In the first step of making the factual finding, the written findings rule of *Friends of Mammoth* requires that the Negative Declaration be written and substantiated.¹²⁰ For the more obviously insignificant projects, a two to three page checklist of relevant factors with written comments should be an adequate record. However, the Negative Declaration will have to be more lengthy and sophisticated as the project looms closer to the area of possible significant effect. Even at this end of the spectrum the point is not to create an exhaustive record, but only to insure careful consideration of the threshold determination and facilitate public and judicial review.¹²¹ This record is a minimal

LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT 84-105 (1973) [hereinafter cited as NEPA IN THE COURTS].

116. See, e.g., *Scherr v. Volpe*, 336 F. Supp. 886, 888, 3 ERC 1588, 1589 (W.D. Wis. 1971), *aff'd* 466 F.2d 1027, 1034, 4 ERC 1435, 1438 (7th Cir. 1972).

117. See *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 466, 4 ERC 1941, 1942 (5th Cir. 1973).

118. 471 F.2d 823, 828, 4 ERC 1785, 1788 (2nd Cir. 1972), *cert. denied*, — U.S. —, 5 ERC 1416 (1973).

119. CEQA states that the agency must make a finding of non-significance if no EIR is to be prepared. CAL. PUB. RES. CODE § 21083 (West Supp. 1973). The judicial review sections support a delineation that has agencies make factual findings and courts review questions of law. *Id.* §§ 21168, 21168.5. In most instances this threshold determination should not require a hearing but can be based only on an agency report. *Id.* § 21168.5. However, the court might choose to remand for a hearing. *Id.* § 21168; see note 164 *infra*.

120. See notes 86-97 *supra* and accompanying text. See also *Hanly v. Kleindeinst*, 471 F.2d at 836, 4 ERC at 1793. However, the majority's rule in *Hanly* would result in dysfunctionally long and involved threshold procedures, and the better policy is for courts to require an EIR in gray area determinations. See note 121 *infra*.

121. The intent should not be to create a mini-impact report in the Negative Declaration. The creation of a complex record at this stage will only tempt agencies to extend this lesser effort to all gray area threshold decisions and thus raise the threshold level, and the courts might be prone to accept this. Even a lengthy Negative Declaration would be a shallow replacement for an EIR, however, for it would not discuss alternatives and mitigating measures. Once the record is adequate to determine possible significant effect, the courts should rule on the correct legal inference of possible significant or no significant effect. See *Hanly v. Kleindeinst*, 471 F.2d at 837-39, 4 ERC at 1794-96 (Friendly, J., dissenting).

The Guidelines state that a Negative Declaration should not be longer than one page. 14 CAL. ADMIN. CODE § 15083(b) (1973). Even for the more obviously in-

burden, and the courts should remand whenever they feel that the findings are insufficient.

The second fact issue is whether the agency's determination of no significant effect is supported by "substantial evidence."¹²² The recent decision in *County of Inyo v. Yorty* put an interesting twist on this. The court stated that the statutory criterion of possible significant effect is met and an EIR required if there is "some substantial evidence that the project 'may have a significant effect' environmentally."¹²³ By this the court presumably meant that the burden rests on the agency to show that there is no substantial evidence that a significant environmental effect may result from the proposed project. However, there is no presumption in CEQA that projects will have a significant effect, and policy would not favor putting such a burden—with its overly documented record—at the threshold decision stage.¹²⁴ It is possible that the court was not laying down an elaborate rule creating a heavy burden but rather was stating the virtual impossibility of an agency supporting a claim that depletion of a county's water table was not a possibly environmentally significant project.¹²⁵ In so responding, the court would be determining what conclusion can be inferred from the facts, a question of law and the next subject of discussion.

The statutory term "significant" is the crux of the threshold decision, and it is the responsibility of the courts to review all applications of this legal term.¹²⁶ Particularly because CEQA is new and skeletal, any finding of fact is not "a description of phenomenon independent of law making or law applying,"¹²⁷ but is directly related to defining and fleshing out CEQA's language. As stated in *Friends*

significant projects only the densest prose could make an adequate record in such an abbreviated space.

122. CAL. PUB. RES. CODE §§ 21168, 21168.5 (West Supp. 1973). See note 119 *supra*. See *Goose Hollow Foothills League v. Romney*, 334 F. Supp. 877, 3 ERC 1087 (D. Ore. 1971) (reversed for no substantial evidence to support determination that project will have no significant effect). Substantial evidence also was apparently the ground for the supreme court's minute order of March 1, 1973, continuing a stay and remanding to the district court for review on the merits. *No Oil, Inc. v. City of Los Angeles*, 2 Civil No. 41619 (2nd Dist. 1973).

123. 32 Cal. App. 3d 795, 809, 108 Cal. Rptr. 377, 387, 5 ERC 1431, 1437 (Third Dist. 1973).

124. See note 121 *supra*. But see note 161 *infra* and accompanying text.

125. See also *Desert Environment Conservation Assoc. v. PUC*, 8 Cal. 3d 739, 741, 505 P.2d 223, 224, 106 Cal. Rptr. 31, 32 (1973), in which possible significant effect was assumed.

126. See K. DAVIS, *ADMINISTRATIVE LAW TEXT* §§ 30.05-07 (1972); Jaffe, *Judicial Review: Question of Law*, 69 HARV. L. REV. 239 (1955); Netterville, *supra* note 114, at 46-68; Note, *Scenic Hudson Revisited: The Substantial Evidence Test and Judicial Review of Agency Environmental Findings*, 2 ECOLOGY L.Q. 837, 858-60. See text accompany note 118 *supra* and note 128 *infra*.

127. Sive, *supra* note 95, at 625, quoting JAFFE, *supra* note 113, at 550.

of *Mammoth*, the courts must ultimately define CEQA's statutory terms.¹²⁸ Moreover, the logic of the situation demands an active judicial stance. Due to the added work and responsibilities imposed by the EIR process, agencies will be tempted to shy away from conclusions of significant effect. CEQA, however, favors preparation of an EIR,¹²⁹ and neutral courts are best equipped to review the legal inference from the facts and to establish over time a reasonably consistent definition of possible significant effect.¹³⁰

b. Categorical exemptions

CEQA also provides for exemptions by classes of projects.¹³¹ These "categorical exemptions" are necessary for a more workable act by relieving agencies of the task of making threshold determinations and Negative Declarations on obviously insignificant projects. The Secretary for Resources must make a finding and a determination that each classification, such as minor additions to single-family homes, does not have a significant impact.¹³² Therefore, this categorical exemption is the result of the same type of process as a Negative Declaration. This exemption, however, must be given more care because it is definitive of a class of projects. Unfortunately, the exemptions thus far declared are not only unsupported by written findings¹³³ but also are often worded so generally that without written findings it is impossible to understand exactly what is the intended scope of the exemptions.¹³⁴ Suit is now being brought to invalidate these ex-

128. In *Friends of Mammoth* the court stated that the courts will define "significant effect" through a case by case method. 8 Cal. 3d at 271, 502 P.2d at 1065, 104 Cal. Rptr. at 777, 4 ERC at 1705.

129. An EIR is required if the proposed project may have a significant effect. CAL. PUB. RES. CODE §§ 21083, 21100, 21151 (West Supp. 1973).

130. The major written work to date on NEPA strongly endorses de novo review by courts of the threshold determination as the best way to insure consistent application of NEPA's intent. NEPA IN THE COURTS, *supra* note 115, at 104-05. See DAVIS TEXT, *supra* note 126, at §§ 30.05-.07; Sive, *supra* note 95, at 625. A court's nontechnical perspective may best protect CEQA's deontology. See Conservation Society v. Volpe, 343 F. Supp. 761, 767, 4 ERC 1226, 1230 (D. Vt. (1973)). See notes 121 and 128 *supra* and accompanying text.

131. CAL. PUB. RES. CODE §§ 21084-86 (West Supp. 1973).

132. *Id.* § 21084. It is apparent from the statutory language that the Secretary's discretion in creating categorical exemptions is limited by the conditions listed in § 21083 which require a finding of significant impact. See *id.* § 21086.

133. See notes 87-97 *supra* and accompanying text.

134. *E.g.*, Class 7: Regulatory Actions for Protection of Natural Resources. Class 7 consists of actions taken by regulatory agencies, as authorized by state law or local ordinance, to assure the maintenance restoration, or enhancement of a natural resource where the regulatory process involves detailed procedures for protection of the environment. Examples include wildlife preservation activities of the State Department of Fish and Game. Construction activities are not included in this exemption.

14 CAL. ADMIN. CODE § 15107 (1973) (The italics show additions suggested for nar-

emptions on the grounds that many are overly broad or in conflict with CEQA's language and that all are unsupported by written findings as required by CEQA and *Friends of Mammoth*.¹³⁵

2. *Judicial Review of the EIR and Agency Decisionmaking*

Under CEQA courts may review agency action for prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in the manner required by law or if the agency's final determination or decision is not supported by substantial evidence.¹³⁶ Amended CEQA further states that this manner of review is declaratory of existing law,^{136a} and, as such, the judicial review sections clearly reflect both (1) the previous treatment by a California court of the procedure surrounding and the adequacy of an EIR as a matter of law¹³⁷ and (2) the dicta in *Friends of Mammoth* that final agency decisions on a project can be reviewed for reasonableness in light of the facts exposed in the EIR.¹³⁸

rowing the exemption's scope. Proposed Amendments, *supra* note 112.) Without specific findings detailing exactly what was intended in this exemption, language as vague and broad as this bucks hardly any limit. It might be seen as allowing the State Board of Forestry to categorically permit clear-cutting of forests on the ground that it was "maintaining" the natural resource through accepted forestry practice; yet, even with the best guidelines for environmental protection, it could not be said that the project would not have a significant impact. Even a project less controversial than clear-cutting forests taken with the good intention of enhancing or protecting the environment may cause an adverse impact on another system. For instance, air pollution control programs might lead to increased amounts of solid waste from precipitators with the attendant disposal problems. Such programs need the careful consideration of residual impacts that CEQA requires of all projects.

135. Center for Law in the Public Interest et al. v. Livermore et al., Petition for a Writ of Mandate with Memorandum of Points and Authorities, at 22-28 (filed June 29, 1973, in the supreme court of California; petition denied, Aug. 16, 1973; subsequently refiled Aug. 28, 1973 in the court of appeal for the third district, petition denied, Oct. 26, 1973; to be refiled in superior court).

The example of unsubstantiated categorical exemptions given in the preceding footnote does not exhaust the question of the legality—other than the deficient enacting procedure—of various categorical exemptions. Numerous other examples may be found in the Memorandum, *supra*, and in Cal. Att'y Gen., Analysis of CEQA Guidelines Issued by the Resources Agency on February 5, 1973.

136. CAL. PUB. RES. CODE § 21168-68.5 (West Supp. 1973). Abuse of discretion is broken down into the following factors: (1) the decision was prejudicial; (2) the agency did not proceed as required by law; (3) the decision was not supported by findings; and (4) the findings were not supported by evidence. W. DEERING, CALIFORNIA ADMINISTRATIVE MANDAMUS § 5.12-5.72 (Cal. CEB 1966). CAL. CODE CIV. PRO. § 1094.5 (West 1970). This format should control for all judicial review of agency decisions under CEQA. *Cf. id.* § 1:4; WITKIN, CAL. PROCEDURE (2d ed.), *Extraordinary Writs*, § 77.

136a. CAL. PUB. RES. CODE § 21168.7 (West Supp. 1973).

137. EDF v. Coastside County Water Dist., 27 Cal. App. 3d 695, 705-09, 104 Cal. Rptr. 197, 203-05, 4 ERC 1573, 1577-79 (1st Dist. 1972).

138. 8 Cal. 3d at 263 n.8, 502 P.2d at 1059 n.8, 104 Cal. Rptr. at 771 n.8, 4 ERC at 1599 n.8. It is the position of this author that interpretation of judicial review

This section will first briefly survey the present procedural law under NEPA and CEQA on the preparation, adequacy, and manner of review of an impact study (EIR). It will then discuss the more difficult issue of the courts' substantive review of the final agency decision on the project, setting forth the perspective the courts should

under amended CEQA still follows NEPA precedent, and this section is developed accordingly. However, there is a body of opinion, as expressed by Thomas Willoughby at the Impact Conference, that amended CEQA no longer is intended to follow NEPA precedent and that review of the adequacy of the EIR is a question to be reviewed only under the substantial evidence test presented in CAL. PUB. RES. CODE §§ 21168 and 21168.5 (West Supp. 1973). Impact Conference, *supra* note 7, at 21-23. Mr. Willoughby bases this, in part, on the assertion that CEQA after A.B. 889 is an act only about "EIR's" and not also an act dealing with agency decisions affecting the environment. *Id.* at 22.

Analysis of amended CEQA does not support Mr. Willoughby's view. First, the Act retains the intent chapter couched in terms of state environmental policy [CAL. PUB. RES. CODE §§ 21000 and 21001 (West Supp. 1973)] and uses language suggestive, in part, of final substantive review—such as "evaluation of projects" [*Id.* §§ 21082, 21083].—in the procedural sections. Nothing mandates reducing the broad interpretation of CEQA found in *Friends of Mammoth*, and it must be assumed that it continues as a statement of environmental policy for all decision-making agencies. (See also *County of Inyo v. Yorty*, 32 Cal. App. 3d at 810, 108 Cal. Rptr. at 388; 5 ERC at 1438: "In many respects the EIR is the heart of CEQA" [but it is not the "sole" of CEQA]). Second although a memo from Assemblyman John Knox, the author of A.B. 889, made available to his fellow legislators, did construe the judicial review sections as Mr. Willoughby has, this early interpretation must be pre-empted by the added amendment coming from a final compromise session which states that the judicial review sections "are declaratory of existing law." *Id.* § 21168.7. The adequacy of an EIR had already been reviewed under CEQA not as a question of agency discretion reviewable only for "substantial evidence," but as a matter about which the courts may construe correct CEQA procedure. *EDF v. Coastside County Water Dist.*, 27 Cal. App. 3d at 705-09, 104 Cal. Rptr. at 203-05, 4 ERC at 1577-78.

Mr. Willoughby's view is best supported by the section on the statute of limitations, CAL. PUB. RES. CODE § 21167 (West Supp. 1973), which relates to an action alleging that an EIR does not comply with CEQA. *Id.* § 21167(c). This section is not dispositive, however, because the notice which runs the statute is to be filed when an agency "approves or determines to carry out a project," part of the notice indicating only that an EIR has been prepared and another part indicating the determination of the agency as to the environmental impact of the project. *Id.* §§ 21108, 21152; 14 CAL. ADMIN. CODE § 15085(g) (1973). Therefore, the section on the statute of limitations is not a clear indication that CEQA does not cover the final agency decision on the project.

The other language most favorable to Mr. Willoughby's view is the statement that an EIR is an "informational document" to be considered in the agency's decision-making process. CAL. PUB. RES. CODE § 21061 (West Supp. 1973). This only states that the EIR not alone determine agency action but be weighed in the agency's decision on the project. In fact, Mr. Willoughby is in general agreement with this, stating that agency decisions which are arbitrary in light of the EIR as weighed against the reasons for the project should be reversed [Impact Conference, *supra* note 7, at 15]; the Guidelines also state that CEQA requires a fair balancing of environmental and economic factors. 14 CAL. ADMIN. CODE § 15012 (1973). (See also note 100 *supra*.) Therefore, most are apparently in agreement that the EIR is not just a full disclosure, educative tool, and this Comment presents an interpretation that can best effectuate the EIR's substantive scope and CEQA's substantive intent.

take in determining whether the decision is supported by substantial evidence. Finally, it will discuss a problem in California law regarding the use of the substantial evidence test in reviewing quasi-legislative actions.

a. Adequacy of agency procedures

The preliminary issue is whether the agency has proceeded in the manner required by law. The first decisions on CEQA have followed NEPA precedent in procedural matters, and because the law under NEPA is well developed and sufficiently discussed by commentators,¹³⁹ only a survey is needed here.

It is generally held that to comply with the law an impact study (EIR) must discuss all the required elements in a "detailed" and understandable manner.¹⁴⁰ Essential to an adequate impact study is a methodology conducive to a full and fair estimation of the environmental impacts of the project in order to make possible a reasoned balancing of the project's benefits as opposed to its "costs."¹⁴¹ There must be a full discussion of all possible and reasonable alternatives.¹⁴² Also, an adequate EIR must be open to and incorporate governmental and public commentary.¹⁴³ Although courts have generally applied a

139. See NEPA IN THE COURTS, *supra* note 115, at 200-45; Note, *Evolving Judicial Standards under the National Environmental Policy Act and the Challenge of the Alaska Pipeline*, 81 YALE L.J. 1592, 1595-1609 (1972) (hereinafter cited as Note, *Judicial Standards under NEPA*).

140. *Sierra Club v. Froehke*, 359 F. Supp. 1289, 1341-43, 5 ERC 1033, 1067-68 (E.D. Tex. 1973).

The EIR must fulfill the role of disclosure of qualified estimations of the best way, all things considered, of meeting the demands of the present while preserving and, if possible, enlarging an ample inheritance for the future. *EDF v. Coastside County Water Dist.*, 27 Cal. App. 3d at 705, 104 Cal. Rptr. at 202, 4 ERC at 1577. (See CAL. PUB. RES. CODE § 21061 (West Supp. 1973).) NEPA IN THE COURTS at 200; Note, *Judicial Standards under NEPA*, at 1598.

141. *Sierra Club v. Froehke*, 359 F. Supp. 1289, 1362-64, 1374-76, 5 ERC 1033, 1082-83, 1090-92 (E.D. Tex. 1973); *EDF v. TVA*, 339 F. Supp. 806, 809, 3 ERC 1533, 1555 (E.D. Tenn. 1972); NEPA IN THE COURTS at 208, 214-17; Note, *Judicial Standards under NEPA*, at 1599-1601; Note, *Substantive Review under the National Environmental Policy Act: EDF v. Corps. of Engineers*, 3 ECOLOGY L.Q. 173, 199-207 (1973). Although environmental impacts often cannot be assessed in monetary terms (see notes 151-52 *infra* and accompanying text), the word "costs" is used in the text to connote real environmental costs which may or may not be monetarizable. A cost/benefit analysis—or, more exactly, a considered weighing of "detriments" and "benefits"—is central to decisionmaking under the major model code for land-use control. AMERICAN LAW INSTITUTE, MODEL LAND DEVELOPMENT CODE §§ 7-303, -404, -501, -502, and notes to § 7-502 (Tent. Draft No. 3, 1971).

142. *NRDC v. Morton*, 458 F.2d 827, 833-38, 3 ERC 1558, 1560-64 (D.C. Cir. 1972); NEPA IN THE COURTS at 217-21; CAL. PUB. RES. CODE §§ 21100(c), 21100(d) (West Supp. 1973). See note 158 *infra* and accompanying text.

143. *Coastside County Water Dist.*, 27 Cal. App. 3d at 707-08, 104 Cal. Rptr. at 204-05, 4 ERC at 1578-79; NEPA IN THE COURTS at 223-28, 234-39.

rule of reason and have not taken all judgment in writing an impact study from the agencies, neither have they balked in asserting "their own right to pass upon the sufficiency"¹⁴⁴ of an impact study as a matter of law and to remand for compliance with the Act.

In addition to reviewing the adequacy of the impact study, the courts have ruled that an agency must carry out its decision-making procedure in a manner conducive to good faith consideration of the impact study. Environmental factors must be reviewed rigorously and separately to prevent premature recommendations to proceed with a project.¹⁴⁵ Moreover, the agency must set forth its analysis of the information disclosed by the study and its reasons for rejecting possible alternatives and mitigating measures.¹⁴⁶ In short, the courts have developed a procedural doctrine to induce a reasoned and objective analysis of all the environmental ramifications of proposed projects.¹⁴⁷ California courts have not and should not hesitate to require as a matter of law the same degree of procedural adequacy now demanded under NEPA.

b. Substantive review

Having determined whether "the agency reached its decision after a full, good faith consideration and balancing of environmental factors," the court must then determine if "the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values."¹⁴⁸ CEQA, like NEPA, sets out specific environmental goals and intends that agencies balance these environmental considerations into final agency decisions.¹⁴⁹ Although

144. *EDF v. Coastside County Water Dist.*, 27 Cal. App. 3d at 704, 104 Cal. Rptr. at 202, 4 ERC at 1576.

145. *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1117-19, 2 ERC 1779, 1784-85 (D.C. Cir. 1971); *Sierra Club v. Froehlke*, 359 F. Supp. 1289, 1357, 5 ERC 1033, 1078 (S.D. Tex. 1973).

146. *Silva v. Lynn*, 482 F.2d 1282, 1284-85, 5 ERC 1654, 1656 (1st Cir. 1973); *EDF v. Froehlke*, 473 F.2d 346, 351, 4 ERC 1829, 1832 (8th Cir. 1972); *Ely v. Velde*, 451 F.2d 1130, 1139, 3 ERC 1280, 1286 (4th Cir. 1971); NEPA IN THE COURTS at 252-56; Note, *Substantive Review under NEPA*, *supra* note 141, at 187-89. See note 89 *supra* and accompanying text.

147. Thus NEPA assumes as inevitable an institutional bias within an agency proposing a project and erects the procedural requirements . . . to insure that "there is no way [the decisionmaker] can fail to note the facts and understand the very serious arguments advanced . . . if he carefully reviews the entire environmental impact statement."
EDF v. Corps of Engineers, 470 F.2d 289, 295, 4 ERC 1721, 1724 (8th Cir. 1972).

148. *Id.* at 300, 4 ERC at 1728.

149. CAL. PUB. RES. CODE §§ 21000, 21001 (West Supp. 1973). See *Friends of Mammoth*, 8 Cal. 3d at 263 n.8, 502 P.2d at 1059 n.8, 104 Cal. Rptr. at 771 n.8, 4 ERC at 1599 n.8; *County of Inyo v. Yorty*, 32 Cal. App. 3d at 814, 108 Cal. Rptr. at 390, 5 ERC at 1439-40. Note, *Substantive Review Under NEPA*, *supra* note 141, at 190-94.

the procedural tools of full environmental disclosure, inter-agency and public review, and new decision-making processes may be the most important elements in producing sound projects, it is clear that review of the final agency decision on the merits is both permitted and necessary to help insure that agency decisions reflect environmental goals. Courts, under both NEPA and CEQA, have expressed their right to review substantive agency decisions, often phrasing the agency's reviewable duty as one of considering environmental factors on an equal basis with the traditional economic and technical factors when deciding to proceed with a project.¹⁵⁰ Such substantive review is closely intertwined with procedural compliance: anything more than the roughest estimation by a court that environmental factors have been fairly weighed will require a stringent review of the agency's procedure in marking and assessing environmental and economic costs and benefits.¹⁵¹ By deflating environmental "costs" and inflating both economic and environmental benefits, an agency could disguise a project's unreasonableness and make a mockery of good faith consideration and balancing.¹⁵² Unless the state Office of Planning and Research develops a methodology for fairly assessing environmental and economic factors, the courts will have to review the record closely for objectivity to insure a fair balancing.¹⁵³

150. For NEPA, see, e.g., *EDF v. Corps of Engineers*, 470 F.2d 289, 298, 4 ERC 1721, 1726 (8th Cir. 1972), cert. denied, — U.S. —, 5 ERC 1416 (1973); see Note, *Substantive Review under NEPA*, at 185-87. For CEQA, see CAL. PUB. RES. CODE § 21000(g) (West Supp. 1973); *Friends of Mammoth*, 8 Cal. 3d at 263 n.8, 502 P.2d at 1059 n.8, 104 Cal. Rptr. at 771 n.8, 4 ERC at 1599 n.8; *County of Inyo v. Yorty*, 32 Cal. App. 3d at 814, 108 Cal. Rptr. at 390, 5 ERC at 1439. The Guidelines agree that CEQA requires a fair balancing of environmental objectives with the more traditional economic objectives. 14 CAL. ADMIN. CODE § 15012 (1973). See also Seneker, STATE BAR J., *supra* note 98, at 184-88. See also notes 100 and 141 *supra*.

The purpose of the EIR is to discuss environmental factors. CAL. PUB. RES. CODE §§ 21060.5, 21100 (West Supp. 1973). The EIR is not meant to be the whole record. Findings on social and economic factors should be developed separately and then weighed with the findings in the EIR. To include all factual findings may cause the legislatively recognized environmental factors to be lost sight of and may add significantly to the time and money costs of the EIR.

151. Agencies have exhibited a strong tendency to aggregate a project's impacts within a single value structure to provide a single, clear-cut rating for evaluating a project, as a whole.

...
When organizing environmental impacts into such a single index, there is a high probability that certain factors, which are neither quantitative nor easily converted into quantitative terms [i.e., environmental values], will be severely distorted or masked.

J. Sorensen & M. Moss, PROCEDURES AND PROGRAMS TO ASSIST IN THE ENVIRONMENTAL IMPACT STATEMENT PROCESS 22-23 (Univ. of Cal. 1973).

152. See Note, *Cost Benefit Analysis and the National Environmental Policy Act of 1969*, 24 STAN. L. REV. 1092, 1103-05 (1972); Findley, *The Planning of a Corps of Engineers Reservoir Project: Law, Economics Politics*, 3 ECOLOGY L.Q. 1, 47-59 (1973).

153. See *Sierra Club v. Froehke*, 359 F. Supp. 1289, 1342, 5 ERC 1033, 1067

In this light, it has been suggested that courts consider a lack of objectivity or other deficiency in an agency's analysis of a project as clear evidence that a substantive decision is likely to be unreasonable in light of environmental standards.¹⁵⁴ This interdependence of procedural and substantive problems necessitates that courts review both to insure sound decisionmaking.¹⁵⁵

c. *The best possible substantive decision*

CEQA's statements of purpose suggest an ongoing environmental evaluation that entails more than a balancing of environmental and economic factors leading to an easy "yes" or "no" conclusion. Crucial to the EIR analysis is a serious consideration of alternatives and mitigating measures to lessen the adverse environmental impact of the proposed project.¹⁵⁶ In *Friends of Mammoth* the court interpreted CEQA's substantive dimension to be primarily concerned with formulation of less environmentally damaging alternatives:

Obviously if the adverse consequences to the environment can be mitigated, or if feasible alternatives are available, the proposed activity, such as the issuance of a permit, should not be approved.¹⁵⁷

A balancing of economic and environmental factors weighing in favor of a project is not enough. Rather, an agency should break a project down into its various benefits and adverse environmental impacts and, incorporating the proposed alternatives or mitigating measures, work toward a final scope and design that creates the least environmental "costs"¹⁵⁸ while preserving the essential economic benefits of the pro-

(S.D. Tex. 1973); NEPA IN THE COURTS, *supra* note 115, at 264. See also Note, *Substantive Review under NEPA*, *supra* note 141, at 194-99. OPR has the legislative mandate to develop whatever guidelines and criteria are necessary to fairly evaluate projects. CAL. PUB. RES. CODE §§ 21083, 21087 (West Supp.1973).

154. Note, *Substantive Review under NEPA* at 189-207.

155. The need for scrutinizing judicial review of both the objectivity of the EIR and the reasonableness of the final weighing has been emphasized by recent data on biased, and thus ineffective, impact statements. A deodorized impact statement is particularly possible where the developer may submit his own impact statement produced by a consulting firm responsible to him, as the Guidelines have interpreted CEQA to allow. 14 CAL. ADMIN. CODE § 15085(a) (1973) interpreting CAL. PUB. RES. CODE §§ 21100, 21151, 21160 (West Supp. 1973). *But see* Senecker, STATE BAR J. *supra* note 98, at 176 & n.29. See Wall St. J., Sept. 27, 1973, at 1, col. 1.

156. CAL. PUB. RES. CODE §§ 2100(g) and 21100 (c and d) (West Supp. 1973). The agency must consider these mitigation measures and alternatives before the project is put into final form. The Guidelines, however, belie the process, stating that only mitigation measures written into the project plan need be discussed in the EIR. 14 CAL. ADMIN. CODE § 15143(c) (1973).

157. 8 Cal. 3d at 263 n.8, 502 P.2d at 1059 n.8, 104 Cal. Rptr. at 771 n.8, 4 ERC at 1599 n.8.

158. See *Sierra Club v. Froehlke*, 359 F. Supp. 1289, 1340-41, 1353-54, 5 ERC 1033, 1066, 1075-76 (E.D. Tex. 1973).

ject. As an example, a dam might have more economic benefits than environmental "costs" yet the agency still should incorporate a fish way that would preserve the river's migrating life. On a larger scale, a dam destructive of long reaches of a unique wild river and partially rationalized as a flood control device should be made smaller to create less of an adverse impact on the river while attacking the flood control problems by other available methods like levees or flood plain zoning.

The process above works toward cost internalization: A project should reflect all its costs including the normally uncharged social costs such as environmental damage.¹⁵⁹ Yet the court's reading does not require rejection of a project if, as finally approved, it still creates public costs by having adverse environmental impacts. Only "feasible alternatives" need to be incorporated. If it is found that a project has more economic benefits than environmental "costs" and if it is found that it still has significant adverse environmental effects and *no further* feasible alternative approaches to mitigate these adverse effects, then CEQA's function has ended. Nonetheless, the agency still may refuse to permit the project under other statutory mandates.¹⁶⁰

In this process of assessing and making findings on costs and benefits, severity of adverse impacts, and feasibility of alternatives, the courts must uphold the findings and determinations of the agency if they are supported by substantial evidence in the whole record. At the same time, due in part to this presumption in favor of the agency, CEQA's disciplinary intent again must be balanced by having the agency carry the burden in court of showing that its final determinations are based on findings supported by substantial evidence. This burden is not unwarranted—the agency already has the responsibility of creating a full record in the EIR and accompanying analysis and is most aware of the reasoning used in coming to the final determination. If the complaining party aggrieved by the agency determination makes a *prima facie* case that the findings or determinations were unsupported or unreasonable, then the court should give the agency the burden of showing the legal justification of its action.¹⁶¹

159. See note 77 *supra* and accompanying text.

160. The Coastal Zone Conservation Commissions are required not to issue permits unless it is found that "the development will not have any substantial adverse environmental or ecological effect." CAL. PUB. RES. CODE § 27402 (West Supp. 1973). The legislature has expressed a policy of not permitting private projects which are found likely to cause "substantial environmental damage." CAL. BUS. & PRO. CODE § 11549.5(e) (West Supp. 1973) (Subdivision Map Act). In addition, a local ordinance which incorporates CEQA states that no project shall be permitted until a finding has been made that "the project will not have a significantly adverse environmental effect." BERKELEY NEIGHBORHOOD PERSERVATION ORDINANCE, at section 6(b)(3) (passed by initiative April 17, 1973). These policies are not affected by questions of feasibility but state a fixed limit.

161. See *Sierra Club v. Froehke*, 359 F. Supp. 1289, 1334-35, 5 ERC 1033,

3. *The Standard of Review*

The primary judicial review sections state that review of questions of fact shall be under a "substantial evidence" test. Section 21168 sets forth the procedures for reviewing "determinations or decisions" under the California writ of administrative mandamus, in which the standard for review of questions of fact is whether there is "substantial evidence in light of the whole record."¹⁶² The following section—21168.5—states that in any action other than one brought under section 21168 "abuse of discretion is established . . . if the determination or decision is not supported by substantial evidence."¹⁶³

Administrative mandamus is limited to review of quasi-judicial decisions,¹⁶⁴ the probable intent of section 21168.5 was to insure that review under CEQA not be artificially limited to actions brought under administrative mandamus as it was in an early draft of A.B. 889.¹⁶⁵ Section 21168.5 governs all actions under CEQA other than those maintainable under administrative mandamus, including quasi-legislative decisions.¹⁶⁶ The standard of review in California for quasi-leg-

1061-62 (S.D. Tex. 1973); L. Jaffe, Book Review, 84 HARV. L. REV. 1562, 1563-64 (1971); Sive, *supra* note 95, at 618-19, 643.

162. CAL. PUB. RES. CODE § 21168 (West Supp. 1973). Although the statutory language for factual review under the writ of administrative mandamus is "substantial evidence in light of the whole record" (CAL. CODE CIV. PRO. § 1094.5(c) (West 1970)), the California courts had consciously ignored the "in the light of the whole record" provision, isolating and considering only the evidence supporting the administrative decision and not that conflicting with it. *Thompson v. City of Long Beach*, 41 Cal. 2d 235, 241, 259 P.2d 649, 652 (1953). However, in the leading case of *Bixby v. Pierno*, 4 Cal. 3d 130, 143, n.10, 481 P.2d 242, 251, n.10, 93 Cal. Rptr. 234, 243 n.10 (1971) the court silently swept out *Thompson* and its progeny and equated the California "substantial evidence in the light of the whole record" test with the test proclaimed in *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-90 (1951), which requires the court to take into account whatever in the record detracts fairly from the agency's substantial evidence support. The difference in scope of the two tests is discussed in *Netterville, The Substantial Evidence Rule in California Administrative Law*, 8 STAN. L. REV. 563 (1956). See also Comment, *Noteworthy Developments in California's Administrative Mandamus*, 8 CALIF. WESTERN L. REV. 301 (1972).

163. CAL. PUB. RES. CODE § 21168.5 (West Supp. 1973).

164. W. DEERING, *supra* note 136, § 2.2. See also *Id.* § 2.8. Administrative mandamus (CAL. CODE CIV. PRO. § 1094.5 (West 1970)) applies to cases where a hearing is required. For a quasi-judicial action in which there was no statutory requirement of a hearing, courts do not favor hearing the full case de novo but prefer to remand, requiring a hearing to be held at the administrative level. *E.g.*, *Fascination v. Hoover*, 39 Cal. 2d 260, 269, 246 P.2d 656, 661 (1952). However, if no hearing may be implied, the court may hear the case de novo. *Munns v. Stenman*, 152 Cal. App. 2d 543, 555-57, 314 P.2d 67, 75-76 (2nd Dist. 1957).

165. A.B. 889, Assembly Final History, Cal. Legis. Reg. Sess. (Draft of Nov. 16, 1972). This danger was brought to the attention of the legislature, and the additional subsection of 21168 was added in a later session. *Id.* (as redrafted Nov. 27, 1972).

166. Among the quasi-legislative determinations regulated by CEQA is the enactment or amendment of zoning ordinances. CAL. PUB. RES. CODE § 21080(a) (West Supp. 1973). Section 21168.5 covers any other suit brought before December 5,

islative decisions traditionally has been the "arbitrary, capricious, or completely lacking in evidentiary support" test,¹⁶⁷ under which the overturning of an agency action by the courts is purportedly more difficult than under the substantial evidence test. Whether review of quasi-legislative factual determinations will be under the codified substantial evidence test or the normal "completely lacking in evidentiary support test" is an important issue. In addition to the statutory language, common sense argues for the former.

CEQA is not a statute focusing on the power and expertise of a single agency;¹⁶⁸ it establishes a state policy affecting all agencies. The legislative function of agencies is as constrained as the judicial function by CEQA's mandate that economic and technical factors not outweigh environmental factors. A city's decision to *rezone* a particular parcel—a quasi-legislative action—should be as limited by this mandate as its decision to grant a *conditional use*—a quasi-judicial action. The options available in a decision to rezone are greater and the rights involved are more general; in granting a conditional use the rights involved are individual and the issue is framed as a yes or no choice. But the physical effects of the two actions on the environment may be identical.¹⁶⁹ An agency no longer acts under the constraints of its enabling legislation alone. CEQA now mandates that the evidentiary support for its decisions represent a fair weighing of environmental factors. This mandate can only be frustrated by review of these actions—identical in impact—under two different judicial standards.

The standard of review raises a final point: CEQA ne-

1972 to review an agency determination under CEQA. *Id.* § 21168.7. This review would include a petition for an injunction and a writ of mandate. *EDF v. Coastside County Water Dist.*, 27 Cal. App. 3d 695, 104 Cal. Rptr. 197, 4 ERC 1573.

167. *Pitts v. Perluss*, 58 Cal. 2d 824, 833, 377 P.2d 83, 88, 27 Cal. Rptr. 19, 24 (1962); *W. DEERING*, *supra* note 136, § 2.8. See also, *Lockard v. City of Los Angeles*, 33 Cal. 2d 453, 461, 202 P.2d 38, 43 (1949) for a similar approach.

168. In *Pitts* the court stated that the nature of the legislative function being performed is controlling. 58 Cal. 2d at 834, 377 P.2d at 89, 27 Cal. Rptr. at 25. Although the language is straightforward, it is also apparent that the court was deferring to the agency's expertise and special responsibility for promulgating rules in the area of its delegated authority. *Id.* at 832-35, 377 P.2d at 88-90, 27 Cal. Rptr. at 24-26. This is not unlike the situation in *Bixby v. Pierno*, 4 Cal. 3d 130, 148-51, 481 P.2d 242, 255-57, 93 Cal. Rptr. 234, 247-49 (1971) (discussed in note 162 *supra*), in which the court, although reviewing facts de novo, deferred to the Corporation Commissioner's proven ability and fairness in interpreting the facts in light of the area of law delegated to his office. The Milk Stabilization Board in *Pitts* performed a statewide rule-making and adjudicatory position like the Corporation Commissioner. The court in *Pitts* may have asserted the looser quasi-legislative standard in part because of the agency's expertise.

169. Two supreme courts have squarely held for substantive review equal to that applied to quasi-judicial decisions for zoning regarding particular parcels. *Fasano v. Bd. of County Comm'rs of Washington County*, 96 Ore. Adv. Sheets 1059, 507 P.2d 23 (1973); *Fleming v. City of Tacoma*, 81 Wash. 2d 292, 502 P.2d 327 (1972).

cessitates that a court review all questions of fact "in light of the whole record"—a process requiring the court to consider whatever is unfavorable to the agency decision—although only administrative mandamus specifically calls for this more searching review.¹⁷⁰ The reasons serve as a summary for this judicial review section: First, the court must review the EIR and environmental analysis for adequacy and good faith consideration. Second, to insure that the agency has reasonably balanced environmental factors, the court will have to review the action in light of the whole record.

B. CEQA as a Comprehensive Planning Tool

Friends of Mammoth declared that a main purpose of CEQA is to provide informed and comprehensive planning. The court saw the EIR as an alternative in those instances in which the city or county did not have a conservation element as part of the comprehensive plans required by California law.¹⁷¹

Although the EIR is now required even when there is a complete general plan,¹⁷² the mechanics and rationale of the EIR process are closely interlaced with the goals of comprehensive planning. CEQA can be a valuable complement to or a reasonably adequate surrogate for a sound plan. The following discussion focuses on four provisions of amended CEQA, which the Guidelines have, with one exception, interpreted in a manner overly restrictive of CEQA's comprehensive planning function.

I. Public Participation

The court in *Friends of Mammoth* interpreted CEQA as requiring significant public participation in the decisionmaking process: "[Early preparation of a draft EIR] will give members of the public and other concerned parties an opportunity to provide input both in the making of the [final EIR] and in the ultimate governmental decision based, in part, on that report."¹⁷³ This reading not only states that the EIR invites intelligent public input but also reflects a policy requiring direct public participation in important environmental decisions. It implies that written comments on an EIR—input in the making of the EIR—and input in the ultimate decision—a hearing—are separate. The Guidelines, however, slight this public role, and

170. See note 162 *supra*.

171. See text accompanying notes 47 and 74-84 *supra*.

172. CAL. PUB. RES. CODE § 21151 (West Supp. 1973), amending ch. 1433, § 1, [1970] Cal. Stat. 2782.

173. 8 Cal. 3d at 263 n.8, 502 P.2d at 1059 n.8, 104 Cal. Rptr. at 771 n.8, 4 ERC at 1599 n.8 (emphasis in the original).

the following discussion argues in contrast that the public has a right to notice that a draft EIR is being prepared and that hearings normally must be held on the final EIR before any decision is made.

The right of the public to comment on a draft EIR had never been questioned under CEQA. The Interim Guidelines of April 1972 did not differentiate in the treatment of public and governmental comments,¹⁷⁴ and in *Coastside County* the right of an expert from the public to have his comment be a part of the final EIR was taken as accepted practice.¹⁷⁵ The Guidelines, however, obfuscate this right to comment by implying that *all* public input will come at a hearing—a hearing the Guidelines make discretionary.¹⁷⁶ Because the clear policy favoring public comments expressed in *Friends of Mammoth, Coastside County*, and the Interim Guidelines could only have been based on sections of CEQA which have not been substantively changed by A.B. 889,¹⁷⁷ the Guidelines are not following the law to the extent that they discourage public comment.

An agency cannot refuse to include a reasoned public comment in the final EIR,¹⁷⁸ and thus notice is the only barrier to the public's ability to comment. The Guidelines, as recently amended, do provide for some effective notice, although this notice will only come after the draft EIR has been prepared.¹⁷⁹ The Interim Guidelines allowed for more effective preparation of a comment by giving notice from the date of the decision to prepare a draft EIR, and this prior interpretation of CEQA should be followed.¹⁸⁰

174. INTERIM GUIDELINES, *supra* note 28, Part A, § 8, at 9; Part B, § 2(B), at 11, § 2(C)(2), at 13, § 2(D), at 17; Part D, at 25-26, Appendices G-1 and G-2.

175. *EDF v. Coastside County Water Dist.*, 27 Cal. App. 3d at 707-08, 104 Cal. Rptr. at 204-05, 4 ERC at 1578-79.

176. 14 CAL. ADMIN. CODE §§ 15085(c), 15087, 15160(b), 15164-65, Appendix A (1973), particularly *id.* § 15165(a).

177. Ch. 1433, § 1, [1970] Cal. Stat. 2782, *as amended*, CAL. PUB. RES. CODE §§ 21104, 21105 (West Supp. 1973).

178. See note 174 *supra* and accompanying text. Equivocally, the Guidelines state that all comments received must be included (CAL. ADMIN. CODE § 15146 (1973)) but limit this to a commenting procedure that ignores public input (see note 176 *supra* and accompanying text).

179. The Guidelines state that the Secretary for Resources shall publish an EIR Monitor on a subscription basis which will list draft EIR's that have been completed. Proposed Amendments, *supra* note 112, § 15180.

180. INTERIM GUIDELINES, *supra* note 28, Part B, 2(B), at 11. Because of the difficulty in preparing a sophisticated and adequate comment on an EIR in the short time span between the completion of a draft and the compilation of the final EIR, it would be more productive to provide notice at the point it is decided to prepare an EIR, as was done in the INTERIM GUIDELINES, *supra*. Cf. COUNCIL ON ENVIRONMENTAL QUALITY, THIRD ANNUAL REPORT 238 (1972). Proposed Amendments, *supra* note 112, incorporate the idea of early notification as matter of sound discretionary, but not mandatory, policy. *Id.* § 15085(b).

Hearings should be held after the complete written record, including the amended EIR and all comments, has been submitted for agency review.¹⁸¹ The hearing should serve the purpose of letting the agency know the general public attitudes toward the balancing process it must undertake.¹⁸² Arguably it is preferable to hold the hearing at an earlier stage to avoid planning time and effort on a project which may be killed by a vituperative public response. However, this might mean that comments critical of the draft EIR have not been received, and the issue would not yet be formulated. Instead, CEQA integrates into the normal planning procedure.¹⁸³ The normal practice is to hold hearings on the full agency staff report covering all issues, and where hearings are now held by statute or regulation, the EIR must be discussed by the agency.¹⁸⁴

In order to accommodate both an early poll of the public response and a hearing on all the available evidence, it is possible to have two

A section in amended CEQA requiring notice of completion of an EIR be filed with the Secretary for Resources is the basis for choosing this latter date for notification of a draft EIR, although the section could easily be read to apply only to the final EIR. CAL. PUB. RES. CODE § 21161 (West Supp. 1973). Read this way, O.P.R. could then sensibly establish an earlier date for notifying other agencies and the public of EIR's in progress. *Id.* § 21083.

181. The Interim Guidelines called for a hearing when it would help resolve a case of significant public controversy. INTERIM GUIDELINES, *supra* note 28, Part D, § 1, at 25. This requirement was distinguished from the public's right to comment on the draft EIR. *Id.* § 4, at 25-26.

182. There are disadvantages to the town meeting approach, however. The most important is that it is the best organized or loudest citizen interest group that gets heard, and its interest may exclude other legitimate interests. If the forces for low-income housing, open space and other interests are not reasonably balanced in persuasive power, the city's or county's land-use decisions may be skewed. Public hearings alone will not insure fair decisionmaking. Cities and counties should be forced through the mandamus procedure to draft all required elements of the general plan (CAL. GOV'T CODE § 65302 (West Supp. 1973)) and to effectuate these elements through ordinances. *Id.* § 65860. Minimum standards for open space, low-income housing, noise control, and conservation having been established, the agency could decide further trade-offs of interests on the basis of the EIR, staff reports, and hearings.

183. 14 CAL. ADMIN. CODE § 15086 (1973).

184. The plaintiffs in *Friends of Mammoth* expressed their opposition to the development at a mandatory conditional use hearing. State law also requires a hearing for a change in zoning, at which consideration of an EIR would be appropriate. CAL. GOV'T CODE § 65804 (West Supp. 1973). The Federal-Aid Highway Act (23 U.S.C. § 128(a) (1971)), as expanded by administrative regulation, requires two sets of hearings, one for the routing of the highway and one for its final design. 23 C.F.R. Appendix A, Policy and Procedure Memorandum 20-8 (1972). This has been interpreted by a federal court to require a hearing on the federal EIS and the state EIR at both hearings. *Keith v. Volpe*, 352 F. Supp. 1324, 1338-41, 4 ERC 1350, 1358-61 (C.D. Cal. 1972). See Note, *Litigating the Freeway Revolt: Keith v. Volpe*, 2 ECOLOGY L.Q. 761, 781-83 (1972). See also 14 CAL. ADMIN. CODE § 15165(a) (1973).

hearings.¹⁸⁵ This would be particularly beneficial if the first was geared toward general environmental issues and the latter focused on more developed plans. Whatever the resolution of the above, it would be improper for an agency to hold no hearing at all. CEQA places a new interest before the agency decision makers—environmental protection—and recognizes a representative of this interest—the public. An agency cannot legally decide upon a project without having offered to hear all affected parties.¹⁸⁶

2. "Jurisdiction by Law" and Inter-Agency Review

CEQA is laconic regarding the responsibility of an agency to obtain comments on a draft EIR from other agencies affected by a proposed project. CEQA requires an agency to obtain comments only from agencies which have "jurisdiction by law with respect to the project;" other comments may be sought but the effort is not mandatory.¹⁸⁷ If "jurisdiction by law" is read narrowly only to include agencies which must approve or help carry out the proposed project, an important function of CEQA will be weakened.

CEQA intends to elicit a comprehensive analysis of a proposed project. Due to bias, insensitivity to various problems, and so forth, one or a few agencies cannot realistically imagine—much less discuss and evaluate—the varied environmental impacts a project might cause. Presently, communication among agencies is often shockingly absent.¹⁸⁸ The mandatory filing of a draft EIR with agencies affected

185. See CAL. ADMIN. CODE § 15165(a) (1973); CAL. PUB. RES. CODE § 21082 (West Supp. 1973).

186. For those agency determinations not covered by present statutes on notice and hearing, the California supreme court decision in *Scott v. City of Indian Wells*, 6 Cal. 3d 541, 492 P.2d 1137, 99 Cal. Rptr. 745 (1972), is perhaps apt precedent. In that case owners of property outside the jurisdictional boundaries of the city were not officially notified of an impending hearing on a conditional use proposed within 300 feet of their property, although resident owners of property within that range were entitled to notice under the city ordinance. The court held these owners were entitled to notice, a hearing, and due consideration of their comments in regard to granting the use permit, even though they were not residents of the city. Although drawing support from due process protection against the taking of a right in property, the court's broader reasoning could be viewed as setting forth a right to be heard whenever a personal right is affected. One's beneficial right in his environment is less direct than the interest of a property owner in the use of nearby property, yet CEQA statutorily recognizes the interest of the public in the environment. See notes 189-190 *infra* and accompanying text. To limit review of actions affecting this environmental trust to officials and to exclude the public from the process is contrary to the spirit of CEQA.

187. CAL. PUB. RES. CODE §§ 21104, 21153 (West Supp. 1973).

188. A glaring, but apparently often repeated, example of parochial agency attitudes toward interagency planning is that of the city which locates a large shopping or industrial center on a jurisdictional border so that it can tax benefits while the adjoining city bears most of accompanying burdens. H. Ellman, Book Review, 1 *ECOLOGY L.Q.* 234, 236-37 (1971). As another example, suit is now being brought under CEQA by

by the proposed project would not only engender more project evaluation, but would also serve the regional planning function of agencies discovering what extra-jurisdictional impacts a proposing agency is not considering and being able in turn to make known their legitimate concern.

In another context, the California supreme court ruled that property owners affected by a project in another jurisdiction have the same due process right to notice and hearing as local residents.¹⁸⁹ The decision arguably supports a policy that jurisdictional boundaries should not serve as barriers to possibly adversely affected parties being notified and heard and having their objections fairly considered.¹⁹⁰ CEQA itself lends some support to the conclusion that "jurisdiction by law" means something more encompassing than just agencies which approve or carry out the proposed project. Because CEQA set up a special procedure in the lead agency principle for exactly such overlapping agencies,¹⁹¹ it is fair to say that "jurisdiction by law" in the notice and comment sections envisions something more.¹⁹²

The final and most direct support for expanded mandatory review comes from the recent decision in *County of Inyo v. Yorty*. In that case, Inyo County sued Los Angeles for not having prepared and filed an EIR for review regarding a significant extraction of Inyo's groundwater. The court with ease and good sense ignored the fact that Inyo County did not have to approve the project and construed CEQA to require a draft EIR to be filed with the planning agencies of jurisdictions "where the project is to be constructed and where significant ecological impact may occur."¹⁹³ Although limited by the facts of on site construction, the principle should expand to the boundaries which CEQA itself has set: if there is a growth-inducing impact, loss of future beneficial uses, or other possible adverse impact on an-

one county against another in part because the latter (although admitting in the EIR that the former would need to upgrade its roads to handle the project's traffic) constructively failed to give the former an opportunity to comment on the draft EIR. *County of Sonoma v. County of Marin et al.*, in the Superior Court of the State of California for the County of Marin, No. 67454, July 10, 1973.

189. *Scott v. City of Indian Wells*, 6 Cal. 3d at 549, 492 P.2d at 1141-42, 99 Cal. Rptr. at 749-50 (discussed in note 186 *supra*).

190. See Note, *Notice Requirements to Parties Outside of City's Zoning*, 61 CALIF. L. REV. 597, 600-01, 603-05 (1973). See also *Township of River Vale v. Town of Orangetown*, 403 F.2d 684 (1968); CAL. BUS. & PRO. CODE § 11528 (West Supp. 1973) (city or county may request all prospective subdivision maps filed in adjacent jurisdictions) and note 208 *infra*. See Senecker, STATE BAR J., *supra* note 98, at 183-84.

191. CAL. PUB. RES. CODE § 21165 (West Supp. 1973).

192. The Guidelines belittle the lead agency procedure by not making consultation by the lead agency with the other approving agencies mandatory. 14 CAL. ADMIN. CODE § 15066(b) (1973). For the Guidelines apparently not even agencies which approve or help carry out a project have jurisdiction by law.

193. 32 Cal. App. 3d at 811, 108 Cal. Rptr. at 388, 5 ERC at 1438.

other agency's area of responsibility, then an adequate EIR can only be drawn up if such affected agencies are requested to review and evaluate the project.¹⁹⁴

3. Ministerial Actions

The EIR procedure does not apply to ministerial projects,¹⁹⁵ due to the concern of the legislature that it would be a needless expense if the agency had no discretionary power to change the proposed project.¹⁹⁶ The Guidelines have expanded this exception by defining "ministerial" broadly;¹⁹⁷ they presume that absent a discretionary provision in a local ordinance, issuance of a building permit is a ministerial act.¹⁹⁸ This categorical approach says too much. Not only have the courts often assumed that a city or county has no mandatory duty to issue building permits,¹⁹⁹ but the California supreme court also has recognized that categorical attempts to separate "ministerial" duty and "discretionary" power are impracticable and must give way to

194. See *id.* at 810, 108 Cal. Rptr. at 387-88, 5 ERC at 1437. Although an agency should not abnegate all interest in which agencies receive its draft EIR, most of the responsibility for distributing drafts should be given to state and regional clearinghouses and planning agencies. A method conducive to good comprehensive planning can be devised (see INTERIM GUIDELINES, *supra* note 28, at 13-15), although the present Guidelines have given a backhand to formalized regional or state distribution channels. 14 CAL. ADMIN. CODE § 15161 (1973).

195. CAL. PUB. RES. CODE § 21080(b) (West Supp. 1973). An act is ministerial "where the law prescribes and defines the duties to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Elder v. Anderson*, 205 Cal. App. 2d 326, 331, 23 Cal. Rptr. 48, 51 (5th Dist. 1962).

196. Willoughby address, *supra* note 7, at 25.

197. 14 CAL. ADMIN. CODE § 15032 (1973). Although the Guidelines' definition is more generous than the judicially stated one in note 195 *supra*, the Secretary for Resources' newly proposed definition would spread ministerial grace over all projects which are approved "after merely determining whether there has been conformity with objective requirements," while narrowing discretionary projects to only those involving policy considerations. Proposed Amendments, *supra* note 112, §§ 15032, 15024. For a persuasive critique of the Guidelines' definition, see Cal. Att'y Gen.'s Supplementary Comments, *supra* note 111, at 6-8.

198. Issuance of a business license or approval of a final subdivision map is also presumed to be ministerial. 14 CAL. ADMIN. CODE § 15073 (1973).

199. *Burns v. City Council*, 31 Cal. App. 3d 999, 1003-05, 107 Cal. Rptr. 787, 789-91 (3rd Dist. 1973). See D. HAGMAN, CALIFORNIA ZONING PRACTICE § 3.6 (Cal. CEB Supp. 1973). In the cases cited in HAGMAN, the cities had ordinances adding land use elements to building permit review. Nonetheless, a city without such ordinances, on finding from the EIR that the proposed building will cause a significant adverse impact, could deny the permit and apply new mitigating zoning or other ordinance. *Cf. Selby Realty Co. v. City of San Buenaventura*, 10 Cal. 3d 110, 123-26, 109 Cal. Rptr. 799, 807-09, 514 P.2d 111, 119-21 (1973); *Spindler Realty Corp. v. Monning*, 243 Cal. App. 2d 255, 268, 53 Cal. Rptr. 7, 14 (2nd Dist. 1966). This slap-dash approach will not be necessary if the courts rule that CEQA's discretionary scope is incorporated into some ministerial review. See Washington cases cited in note 202 *infra*.

policy considerations.²⁰⁰

The policy of CEQA—to which the Guidelines must yield—requires an EIR to be prepared for a project of possibly significant effect. In *Friends of Mammoth* the court held that “prior to the decision to grant the conditional use and building permits” an EIR must be prepared.²⁰¹ If there is no preliminary review procedure far enough along in the formulation of the project to assess its environmental impact accurately, such as there is for a conditional use, then this assessment must be made at the later stage of issuing the building permit. In such a case, the building permit becomes the only focus for CEQA and land-use considerations and, by necessity, takes on discretionary significance.²⁰²

Having the EIR and discretionary determination fall at the building permit stage is undesirable for both the builder, who needs certainty before investing too heavily, and the agency planner, who desires to affect the project in its early stages. Therefore, for projects not requiring a conditional use, subdivision map, or other considered review, an agency should create an early permit procedure to screen projects for possible significance and divert those for which an EIR is required into a special CEQA review procedure.²⁰³

4. *General Plans and Cumulative Effects*

Although CEQA's requirements will focus most often on individual projects proposed to be constructed, CEQA also explicitly applies to governmental legislative action such as zoning.²⁰⁴ The Guidelines

200. *Johnson v. State of California*, 69 Cal. 2d 782, 788, 447 P.2d 352, 357, 73 Cal. Rptr. 240, 245 (1968).

201. 8 Cal. 3d at 262, 502 P.2d at 1059, 104 Cal. Rptr. at 771, 4 ERC at 1598.

202. See D. HAGMAN, *supra* note 199, at § 3.6. The court in *Friends of Mammoth* saw that respondents' reading of CEQA to include only public works projects would render the Act ineffectual. See text accompanying notes 82-83 *supra*. Similarly, to call a building permit “ministerial” in light of the new factors which CEQA requires to be brought into such permitting would create a substantial loophole in the Act.

Washington state courts have followed this general reasoning in interpreting their very similar State Environmental Policy Act (SEPA) (RCWA § 43.21 *et seq.* (West Supp. 1972)). In *Juanita Bay Assoc. v. City of Kirkland*, the court held that SEPA “introduces an element of discretion into the making of decisions that were formerly ministerial.” 9 Wash. App. —, 510 P.2d 1140, 1149, 5 ERC 1769, 1774 (1973). In that case, granting the “ministerial” grading permit was the threshold stage for applying SEPA review. In a later supreme court opinion it was strongly noted that the building permit, to which the court applied SEPA, was a “nonduplicative” review and that “no environmental evaluation ha[d] taken place at any of the [earlier] critical stages of governmental action.” *Eastlake Community Council v. Roanoke Associates*, — Wash. —, 513 P.2d 36, 47-48, 5 ERC 1897, 1903 (1973). These cases teach that jurisdictions must implement CEQA review at an earlier stage of project review in order to avoid an otherwise necessary application of CEQA at the later grading or building permit stage.

203. CAL. PUB. RES. CODE § 21082 (West Supp. 1973). Cf. *Selby Realty v. O'Bannon*, 2 Cal. App. 3d 917, 82 Cal. Rptr. 807 (2d Dist. 1969).

204. CAL. PUB. RES. CODE §§ 21080, 21083(b) (West Supp. 1973).

have provided for this wider perspective, requiring an EIR for any governmental activity ultimately resulting in physical change, such as local general plans.²⁰⁵ Logically, this provision should translate to all long-term planning which determines the course of future development and possible environmental impacts.

The wider perspective, however, should not be limited to initiating or amending codified plans. For example, the Guidelines state that generally categorically exempt projects like single family houses may need an EIR if the cumulative impact of successive projects of the same type in the same locale over time may have a significant impact.²⁰⁶ Most sensibly, an agency, realizing this possibility, should prepare an EIR on its future program of granting permits, thereby assessing the adequacy of its present zoning in light of probable future impacts on resources. This approach avoids the inequity of putting on later projects the sole burden of EIR cost and possible denial or extreme mitigation. More importantly, it places on the agency the responsibility of analyzing the exact type and volume of development a land area or resource is capable of sustaining.²⁰⁷ There is, of course, a limit to this; CEQA does not require local or regional plans. Yet, particularly when agencies act without a framework of macro-environmental studies and plans, CEQA should prevent balkanization of individually insignificant projects and force agencies to analyze the cumulative environmental consequences of their activity.

A partial solution is the comprehensive general plan and conforming zoning now required by California law.²⁰⁸ An EIR must be pre-

205. 14 CAL. ADMIN. CODE § 15037(a)(1) (1973). For a useful discussion of CEQA's function in relation to annexation, see Seneker, STATE BAR J., *supra* note 98, at 168-74.

206. *Id.* § 15114. See also *id.* § 15069. Although unnecessarily limited to public multiple and phased projects, this latter section develops the policy that an agency must look beyond individual projects when the total of the undertakings may compromise a larger "project" of possible significant effect. Requiring this zoning approach to possible multiple future development is particularly important in light of CEQA's ministerial exception which the Guidelines have generously presumed to apply to all building permits and, in turn, which agencies or private parties might argue excepts them from any compliance with CEQA. See notes 197-202 *supra* and accompanying text.

207. Agencies may prepare EIR's in advance for programs regulating project applications to come. *Id.* § 15068. Counties with the most environmental treasures, such as the mountain counties, also are less financially capable of hiring the staff to prepare or adequately review EIR's. However, CEQA does permit agencies to charge the costs of preparing an EIR to the parties whose project is being reviewed for a permit. CAL. PUB. RES. CODE § 21089 (West Supp. 1973), 14 CAL. ADMIN. CODE § 15053(a) (1973). An agency anticipating permit applications could prepare an EIR to study land capacities and later charge permittees a reasonable share of its costs.

208. CAL. GOV'T CODE §§ 65300 *et seq.* (West Supp. 1973). As in CEQA's inter-agency referral, formulating or amending a general plan requires its submission to overlapping or abutting jurisdictions. *Id.* §§ 65305-06.

pared in formulating and amending these, and many of the basic macro-environmental issues discussed in an EIR—general environmental impacts, growth-inducing effects, long- and short-term trade-offs—can be determined and worked into land use and resource controls at this stage. If the resulting zoning is strictly drawn to mitigate or prevent significant adverse environmental impacts, then it would be reasonable to consider that the threshold of possible significance for subsequently permitted individual projects would be higher. Yet, the function of the individual EIR for particularly large, complex, or sensitively located projects is not diminished by such zoning; for these, the EIR still aids in building an environmentally sound project by providing more exact information on alternatives and mitigating measures.²⁰⁹

Much of CEQA's policy can best be realized when reviewed in a comprehensive planning perspective. Public participation, inter-agency feedback, early assessment of permits, and EIR's for zoning all reflect comprehensive planning. Yet CEQA has its unique functions: intensive study of individual projects, procedural rights to notice and consideration of one's objections, and rigorous judicial review. In the coming years when California has gone through the shakedown with both general plans and CEQA, some of CEQA's scope may have more sensibly fallen to general planning, but CEQA will retain unique functions essential to the goals of careful environmental planning.

CONCLUSION

An act such as CEQA provides new opportunities in improving the method and basis of agency decisionmaking. In *Friends of Mammoth* the California supreme court not only interpreted CEQA to include permitted private projects but also took the opportunity to tighten up procedural requirements and set out substantive parameters in environmental decisions. The following amending by A.B. 889 has not eroded the opinion's broad scope and it remains a prophylactic against CEQA's degenerating into a meaningless routine. The Guidelines, however, have implemented CEQA so cryptically as to wound CEQA's environmental planning function. This conflict between the open and comprehensive planning which the supreme court read CEQA to intend and the equivocal approach of the Guidelines is the seed for extensive future litigation.

Robert Andrews, Jr.

209. The use of an EIR as an integral part of a comprehensive planning scheme is similar to the more exacting review envisioned for significant projects under the ALI MODEL LAND DEVELOPMENT CODE, *supra* note 141, at § 7-502.

