The Judicial Development of the California Environmental Quality Act

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The California Environmental Quality Act (CEQA), now entering its fifteenth year, has fundamentally affected governmental approvals of development proposals and generated an ever-increasing amount of case law. This Article examines the principal CEQA decisions, contrasting the judicial approach to important issues and pointing out implications for future litigation. The Article concludes by addressing the impact of the courts on the development of the administrative guidelines implementing CEQA.

INTRODUCTION

California has a longstanding reputation as a state with stringent laws for protecting its environment.[1] A major factor contributing to this

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[1] This reputation recently received strong support from a study completed by the Conservation Foundation that attempted to rank the environmental control efforts of each of the fifty states. C. DUERKSEN, ENVIRONMENTAL REGULATION OF INDUSTRIAL PLANT SITING 218-29 app. A. (1983). The ranking was constructed around an index of 23 environmental and land-use indicators. Each of these was assigned a point value based on its "relative importance in assessing a state's environmental efforts" as determined by the staff of the Conservation Foundation. The indicators included the existence of state impact statement requirements, per capita environmental quality control expenditures, per capita expenditures for environmental controls, existence of certain state laws for land use planning (such as power-plant siting and land-use planning), agricultural preservation tools, and approval by the Environmental Protection Agency of certain state regulatory programs under federal laws. California received the maximum of four points for the existence of its environmental impact report requirement as well as another four points for the priority given environmental protection by the state legislature. California was found to have a set of standards exceeded in strictness only by the controls adopted by Minnesota, which received a total of 47 points. California followed with 46. Next in order were: New Jersey (45), Massachusetts (44), and Oregon (42). The "bottom five" were Alabama (10), Missouri (14), Mississippi (15),

reputation is the existence of its most encompassing piece of environmental legislation, the California Environmental Quality Act of 1970 (CEQA).[2] Patterned after the federal National Environmental Policy Act (NEPA),[3] CEQA requires the preparation of an Environmental Impact Report (EIR) before a state governmental agency or local government approves a proposal that may affect the environment. In this respect, CEQA resembles other "little NEPA's" passed by over half of the states.[4] However, CEQA has always been recognized as containing provisions that are potentially more far-reaching than most of these other laws.

The close relationship between CEQA and NEPA manifests itself in a number of ways. For example, because of the striking similarity in statutory language, California courts have frequently relied on NEPA precedents when construing the provisions of CEQA.[5] Moreover, the regulations adopted by the federal Council on Environmental Quality (CEQ) to implement NEPA parallel certain administrative reforms previously undertaken in California, perhaps because the authors of the regulations drew upon the experience with CEQA's provisions.[6]

Given their common background, the divergence in legal and politi-

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Idaho (16), and New Mexico (18). *Id.*

[2] CAL. PUB. RES. CODE §§ 21000-21176 (West 1977 & Supp. 1984).

[3] 42 U.S.C. §§ 4321-4370 (1977).

[4] Twenty-eight jurisdictions currently have an environmental impact statement requirement. *See* Robinson, *SEQRA's Siblings: Precedents from Little NEPA's in The Sister States*, 46 ALB. L. REV. 1155, 1157 n.28 (1982); *see also* Pridgeon, Anderson & Delphey, *State Environmental Policy Acts: A Survey of Recent Developments*, 2 HARV. ENVTL. L. REV. 419 (1977); Yost, *NEPA's Progeny: State Environmental Policy Acts*, 3 ENVTL. L. REP. 50,091 (1973).

[5] *See, e.g.*, No Oil, Inc. v. City of Los Angeles, 13 Cal. 3d 68, 80, 529 P.2d 66, 74, 118 Cal. Rptr. 34, 42 (1974); Friends of Mammoth v. Board of Supervisors, 8 Cal. 3d 247, 261, 502 P.2d 1049, 1057, 104 Cal. Rptr. 761, 769 (1972); Residents Ad Hoc Stadium Comm. v. Board of Trustees, 89 Cal. App. 3d 274, 287, 152 Cal. Rptr. 585, 595 (1979); Whitman v. Board of Supervisors, 88 Cal. App. 3d 397, 408-09, 151 Cal. Rptr. 866, 872 (1977); County of Inyo v. City of Los Angeles, 71 Cal. App. 3d 185, 192, 139 Cal. Rptr. 396, 401 (1977); Shawn v. Golden Gate Bridge Dist., 60 Cal. App. 3d 699, 702, 131 Cal. Rptr. 867, 869 (1976); San Francisco Ecology Center v. City & County of San Francisco, 48 Cal. App. 3d 584, 594-95, 122 Cal. Rptr. 100, 106-07 (1975); People v. County of Kern, 39 Cal. App. 3d 830, 842, 115 Cal. Rptr. 67, 75 (1974).

[6] Letter from Nicholas Yost to Lindell L. Marsh (Feb. 14, 1984) (noting that the CEQ Regulations "[b]orrowed from the work . . . done on A.B. 884," a California bill that affected CEQA) (copy on file with author). Mr. Yost formerly was head of the California Attorney General's Environmental Unit and later served as General Counsel for CEQ.

cal acceptance of the two laws is striking as both reach their fifteenth anniversary. The federal act appears to be maturing as an accepted, if not always welcome, regulatory requirement. Despite the Reagan Administration's continued emphasis on "regulatory reform" as a cornerstone of its economic policy,[7] the administration has not seriously attempted to amend or repeal the NEPA regulations enacted by the Carter Administration.[8]

In contrast, CEQA was strongly attacked in 1983 by individuals who decried both "major abuses" in litigation brought pursuant to the Act and delays caused by CEQA's implementation.[9] Proposed solutions included wholesale exemptions from the Act's environmental impact reporting mandates and fundamental changes in litigation procedures, such as requiring plaintiffs to post bonds in CEQA lawsuits or imposing liability for attorney's fees on an unsuccessful plaintiff. Although most of the more far-reaching proposals were withdrawn or rejected, the 1983-84 California State Legislature passed several bills making important changes in CEQA procedure.[10]

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[7] CONSERVATION FOUNDATION, STATE OF THE ENVIRONMENT 386-87, 406-09 (1982).

[8] *See Council Issues NEPA Regulations Guidance: Rules Left Unchanged by Comments, Hearings*, 14 ENV'T REP. (BNA) 519 (1983). The article states that CEQ issued a guidance statement for NEPA's implementing regulations, "an action that a top CEQ official said means that no changes in the rules will be made as a result of suggestions received during two years of hearings and comment periods." *Id.* Earlier indications were that more widespread changes were contemplated. *See Watt Memo Says Interior Seeks to Open Wilderness Areas, Streamline EIS System* and *CEQ Chairman-Designate Plans Review of Environmental Impact Statement Rules*, 12 ENV'T REP. (BNA) 128-29 (1981).

[9] *See* Ashby, *Developers Back Proposals to Alter Environmental Act*, L.A. Daily J., Nov. 24, 1983, at 1, col. 6. The article notes that a series of bills "aimed at eliminating what critics of the California Environmental Quality Act believe are major abuses" were being studied. *Id.* The article continues to state that "[d]evelopers, municipalities and their attorneys have contended that litigation made possible under the act has spawned frivolous lawsuits which have significantly hampered development projects." *Id.*

[10] The most important of these bills is Assembly Bill 2583, which made significant changes to CEQA procedures. Act of Sept. 28, 1984, ch. 1514, 1984 Cal. Legis. Serv. 161 (West) (to be codified at scattered sections of CAL. PUB. RES. CODE). Among other amendments this bill: (1) declares that public projects must be given the same level of review as private projects; (2) requires public agencies making findings under Public Resources Code section 21081 to base those findings on substantial evidence in the record; (3) limits comments by responsible agencies to substantive issues that are within the agency's area of expertise or that involve activities required to be carried out or approved by the agency; (4) declares that statements in an EIR and comments on an EIR are not determinative of whether a project may have a significant environmental

Certainly CEQA is no stranger to controversy.[11] The first California Supreme Court decision regarding CEQA, *Friends of Mammoth v. Board of Supervisors*,[12] held CEQA applicable to private projects. This produced a political firestorm only two years after its enactment. In addition, CEQA was at the heart of two other environmental controversies in the 1970's, both of which had national ramifications — the withdrawals of the "SOHIO Project" and the Dow Petrochemical project.[13] The 1983-84 controversy, occurring after several years of relative

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effect; (5) contains a specific timetable expediting the litigation process and limiting the time for preparation of the administrative record and briefs; and (6) requires the parties to engage in a settlement conference. Other bills that were passed include Assembly Bill 3772, Act of July 11, 1984, ch. 440, 1984 Cal. Legis. Serv. 112 (West) (to be codified at CAL. PUB. RES. CODE § 21083.3) (declaring that no EIR is needed for certain residential development projects when an EIR was previously prepared for a rezoning or planning designation); Assembly Bill 2897, Act of July 18, 1984, ch. 586, 1984 Cal. Legis. Serv. 644 (West) (to be codified at CAL. PUB. RES. CODE § 21080.2) (shortening to 30 days the period in which a lead agency must determine whether an EIR or negative declaration is needed); Assembly Bill 2411, Act of Aug. 15, 1984, ch. 637, 1984 Cal. Legis. Serv. 40 (West) (to be codified at CAL. PUB. RES. CODE §§ 21104, 21153) (requiring lead agencies to consult with the project applicant and other specified persons at an early stage in the proceedings); and Senate Bill 1079, Act of Sept. 17, 1984, ch. 1213, 1984 Cal. Legis. Serv. 540 (West) (to be codified at CAL. PUB. RES. CODE § 21168.9) (elaborating on the remedies a court may order in CEQA litigation). These bills were approved by the Governor after this Article was submitted for publication, and therefore are not discussed.

Bills introduced in 1983-84 that were not passed included Assembly Bill 2617, which would have provided that the prevailing party in a suit under CEQA was entitled to all reasonably incurred costs of suit, including attorney's fees, in any action to set aside the decision of a public body; and Assembly Bill 1919, authorizing recovery of attorney's fees.

[11] Bass, *CEQA 1983: Alive! But How Well?*, 4 CAL. REG. L. REP., Summer 1984, at 3 ("Controversial since its passage, CEQA has been the subject of great debate among public officials, has fueled hundreds of court decisions and has been amended many times."); *see also* T. TRYZNA & A. JOKELA, THE CALIFORNIA ENVIRONMENTAL QUALITY ACT: AN INNOVATION IN STATE AND LOCAL DECISIONMAKING 26-30 (1974) (describing the reaction to the *Friends of Mammoth* holding that CEQA applied to private projects: "The construction industry, the building trade unions, and the financial community reacted with surprise and alarm at the ruling, claiming the survival of the building industry and the economic well-being of the whole State has been put in jeopardy . . . ."); PROCEEDINGS OF THE CALIFORNIA ENVIRONMENTAL IMPACT LAW CONFERENCE (transcript of proceedings at U.C. Davis, Apr. 7, 1973) (describing the aftermath of the *Friends of Mammoth* holding); Comment, *Aftermammoth:* Friends of Mammoth *and the Amended California Environmental Quality Act*, 3 ECOLOGY L.Q. 349 (1973).

[12] 8 Cal. 3d 247, 104 Cal. Rptr. 761, 502 P.2d 1049 (1972).

[13] *See* C. DUERKSEN, *Dow vs. California:* A TURNING POINT IN THE ENVIROBUSINESS STRUGGLE (1982). The "Dow Project" was a proposal by Dow Chemical Com-

calm, demonstrates that CEQA is not yet politically stable.

In response to the recently expressed concerns, several reviews of the statute have been undertaken. The most comprehensive study was carried out by the California State Bar Committee on the Environment at the request of the State Assembly Committee on Natural Resources.[14] The study produced a series of legislative recommendations relating to the Act's administration and to the procedures for judicial review of projects approved pursuant to CEQA. The Governor of California also undertook a review of CEQA's effect on housing supply.[15] At the same time, CEQA's supporters have taken a stronger role in defending the Act and promise vigorous opposition to any weakening changes.

While there is no consensus on the reforms needed, all parties agree that the evolution of CEQA since its passage in 1970 has been extraordinary. From its origin as a noncontroversial bill with apparently limited provisions, it has evolved into an administrative regulatory scheme affecting all large developments in California. Further, the ju-

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pany to construct a $500 million chemical production facility in Solano County. The project needed several important approvals, including the rezoning of the site from an agricultural designation to open space and a "dredge and fill permit" from the United States Army Corps of Engineers. This subjected the project to CEQA's EIR process and NEPA's Environmental Impact Statement procedure. In 1977, after several years of consideration, Dow cancelled the project, blaming California for bureaucratic delays. *Id.* at 109. *See also* C. DUERKSEN, *supra* note 1, at 21. The SOHIO project, announced by Standard Oil of Ohio in late 1975, was a proposal to build a crude oil terminal in Long Beach, California and a pipeline to transport oil from California to Midland, Texas. The SOHIO proposal also required both federal and state approvals. The proposal caused much debate over its air pollution impact in Los Angeles as well as several lawsuits under CEQA. In March, 1979, SOHIO withdrew its proposal. *Id.* at 30-31. In his book *Environmental Regulation of Industrial Plant Siting*, *supra* note 1, Mr. Duerksen cites the Dow and SOHIO projects as two of three examples of "celebrated siting disputes." *See also* Baker, *Who's to Blame for the Sohio Fiasco?*, CAL. J., May 1979, at 156.

[14] COMMITTEE ON THE ENVIRONMENT, CALIFORNIA STATE BAR, THE CALIFORNIA ENVIRONMENTAL QUALITY ACT: RECOMMENDATIONS FOR LEGISLATIVE AND ADMINISTRATIVE CHANGE (1983) [hereafter STATE BAR CEQA REPORT). The study was conducted in three phases. First, the Committee heard two days of testimony from individuals experienced in the CEQA process. While the hearings were not solely intended to focus on problems with the Act, their principal purpose was to examine perceived problems and to develop legislative solutions. The Committee also received written materials from a number of sources, analyzed the issues, and drafted a report. The final 95-page document contains a number of legislative recommendations. The author of this Article was a member of this Committee.

[15] Bass, *supra* note 11, at 4. The Governor's CEQA and Housing Task Force surveyed a large number of residential developers throughout the state to determine their views on CEQA's effect on housing.

dicial role under CEQA has been so pervasive that individuals concerned with the implementation of the Act must now draw on a body of interpretive case law that exceeds 125 published decisions.[16]

This Article uses the recent scrutiny of CEQA as the impetus for a general examination of the CEQA case law emerging over the past fourteen years. The discussion first analyzes the central role that several key California Supreme Court decisions have played in the judicial development of CEQA. The Article next divides the decisions into principal categories to highlight the contrasting judicial approaches to various issues. The main categories used are (1) threshold issues, (2) the adequacy of the EIR, and (3) the substantive effect of CEQA. Finally, although not principally concerned with CEQA's administration by public agencies, this Article discusses the impact of the courts on administrative implementation in two important respects: the shift of power over CEQA implementing procedures from the local to the state government level and the problem of administrative complexity. First, however, the requirements of CEQA and its philosophical foundation must be summarized briefly.

I. AN OUTLINE OF CEQA'S REQUIREMENTS

CEQA was conceived as a solution to a documented and well-defined problem: the failure of government agencies at both the state and local level to consider fully the environmental implications of their actions.[17] The Act's basic purposes, derived directly from this premise, are (1) to inform government decisionmakers and the public about the potential environmental effects of proposed activities; (2) to identify methods for avoiding or significantly reducing environmental damage; (3) to prevent significant, avoidable environmental damage by requiring changes in

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[16] At the time of publication, the most recent CEQA decision considered was City of Poway v. City of San Diego, 155 Cal. App. 3d 1037, 202 Cal. Rptr. 366 (1984).

[17] The Act was the product of the California Assembly Select Committee on Environmental Quality, which proposed adoption of the "Environmental Quality Act of 1970" by the legislature. CAL. ASSEMBLY SELECT COMMITTEE ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL BILL OF RIGHTS 21 (1970). The Committee was charged with proposing an "Environmental Bill of Rights" and legislative actions to protect California's environment. *Id.* at 13. In proposing the passage of an Environmental Quality Act, the Committee noted that while "preparation of environmental impact reports by all levels of California government will not automatically prevent all environmental degradation," the reports "will provide the initial steps for applying an orderly process to the consideration of the relationship of man's activities to the environment." *Id.* at 21; *see also* J. WHARTON & M. LEWIS, LEGISLATIVE HISTORY OF THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (1976).

projects, either by the adoption of alternatives or the imposition of mitigation measures; and (4) to disclose to the public the reason a project was approved notwithstanding significant environmental effects.[18]

CEQA uses two methods to accomplish these purposes. First, the legislative intent of the Act is set forth to guide decisionmakers.[19] The heart of CEQA, however, is the well-known EIR requirement. State and local agencies "shall prepare, or cause to be prepared by contract, and certify the completion of an environmental impact report on any project they propose to carry out or approve which may have a significant effect on the environment."[20] The EIR must cover seven topics, including analyses of the significant environmental effects of the proposed project, any significant environmental effects that cannot be avoided if the project is implemented, mitigation measures proposed to minimize the significant environmental effects, alternatives to the project, and the growth-inducing effects of the proposal.[21]

Of course, not all projects require preparation of an impact report. Public agencies follow a three-step approach to determine whether one is needed. First, if at the outset it is certain that a project will not have a significant effect on the environment, the project is excused from further CEQA review.[22] Alternatively, the project may fit within a category of projects expressly exempt from CEQA compliance.[23] Second, if

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[18] CAL. ADMIN. CODE tit. 14, § 15002(a) (1983). This section is part of the "Guidelines for the Implementation of the California Environmental Quality Act," found at *id.* §§ 15000-15387. The Guidelines were approved by the Secretary for Resources pursuant to statutory authorization. *See* CAL. PUB. RES. CODE § 21083(c) (West 1977 & Supp. 1984).

[19] CAL. PUB. RES. CODE §§ 21000, 21001, 21002, 21002.1 (West 1977 & Supp. 1984).

[20] *Id.* § 21100 (West Supp. 1984). Section 21100 sets out the EIR requirement for state agencies. An almost identical requirement for local agencies, such as cities and counties, is contained in *id.* § 21151.

[21] An EIR normally must also contain an analysis of "[t]he relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity" and "[a]ny significant irreversible environmental changes which would be involved in the project should it be implemented." *Id.* § 21100(e), (f) (West Supp. 1984). These two requirements are not required for certain types of impact reports.

[22] *See* CAL. ADMIN. CODE tit. 14, § 15002(k) (1983); *see also* No Oil, Inc. v. City of Los Angeles, 13 Cal. 3d 68, 79, 529 P.2d 66, 70, 118 Cal. Rptr. 34, 38 (1974).

[23] CAL. PUB. RES. CODE § 21084 (West 1977) requires that the Guidelines include a category of projects that "have been determined not to have a significant effect on the environment and which shall be exempt from the provisions of this division." Additionally, the Code, *id.* § 21080(b) (West Supp. 1984), contains a list of 18 classes of projects that the legislature has exempted from CEQA. These include actions necessary

the project may have a significant effect on the environment, the public agency undertakes an "initial study."[24] The purpose of the study is to determine whether there may be a significant environmental impact.[25] If the agency finds there will not be an adverse effect, a "negative declaration" is prepared and further CEQA compliance is unnecessary.[26] Finally, if the project may have a significant effect on the environment, an EIR must be prepared.[27] A "Draft EIR" is first circulated to the public and usually to certain governmental agencies for comment. After receiving comments, the public agency that drafted the report must respond to the issues raised by the reviewers and, in some instances, revise the impact report.[28]

The agency then determines whether to approve the project. CEQA contains explicit requirements pertaining to approval of projects that have significant environmental impacts. Most importantly, public agencies should not approve projects as proposed if feasible alternatives or mitigation measures are available that would substantially lessen the project's significant environmental effects. Each public agency must mitigate or avoid the significant environmental effects of projects it approves or carries out whenever feasible.[29]

Nonetheless, CEQA does allow public agencies to approve projects that damage the environment. If economic, social, or other conditions make it infeasible to mitigate the project's significant effects on the en-

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to prevent or mitigate an emergency, projects that a public agency rejects or disapproves, and ministerial projects proposed to be carried out or approved by a public agency.

[24] An "initial study" is a "preliminary analysis prepared by the lead agency to determine whether an EIR or a negative declaration must be prepared or to identify the significant environmental effects to be analyzed in an EIR." CAL. ADMIN. CODE tit. 14, § 15365 (1983).

[25] *Id.* § 15063 (describing the conduct of an initial study).

[26] CAL. PUB. RES. CODE § 21080(c) (West Supp. 1984) ("If a lead agency determines that a proposed project, not otherwise exempt from the provisions of this division, does not have a significant effect on the environment, the lead agency shall adopt a negative declaration to that effect.").

[27] The Code, *id.* § 21100, requires the preparation of an EIR by state agencies on any project that "may have a significant impact on the environment." The EIR requirement for local agencies is contained in *id.* § 21151 (West 1977 & Supp. 1984), which uses almost identical language to § 21100.

[28] CAL. ADMIN. CODE tit. 14, § 15088 (1983). The written response shall describe disposition of significant issues raised. If there is a disagreement between the comment and the lead agency's position, there must be reasons why the specific comments and suggestions were not accepted.

[29] CAL. PUB. RES. CODE § 21002 (West Supp. 1984).

vironment, the project may be carried out anyway.[30] The public agency, however, must make specific findings disclosing its reasons for approval. Changes or alternatives required in, or incorporated into, the project that mitigate or avoid the significant environmental effects must be identified. Alternatively, the economic, social, or other considerations precluding adoption of the mitigation measures or project alternatives discussed in the EIR must be given.[31]

The day-to-day implementation of the Act's provisions is largely governed by guidelines adopted by the Secretary for Resources pursuant to statutory authorization.[32] These "State EIR Guidelines" detail the procedures to be followed in the EIR process from the initial acceptance of an application to the approval of a project after certification of the final EIR.[33]

In its simplest sense, CEQA is a vehicle for reform of regulatory procedures.[34] It attempts to inform local and state government decisionmakers through a series of specific procedural steps.[35] The basic philosophy is that education concerning environmental effects will lead to more rational decisions.

II. THE ROLE OF THE CALIFORNIA SUPREME COURT

A. Overview of the Judicial Response

The role of the courts in enforcing the flood of environmental legislation passed in the 1970's has been the subject of extensive commentary.

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[30] Section 21002 states that "in the event specific economic, social, or other conditions make infeasible such project alternatives or such mitigation measures, individual projects may be approved in spite of one or more significant effects thereof." *Id.*

[31] *Id.* § 21081 (West 1977).

[32] The statute, *id.* § 21083 (West 1977 & Supp. 1984), requires the Office of Planning and Research to develop guidelines for the implementation of CEQA. A number of specified topics must be addressed, including "objectives and criteria for the orderly evaluation of projects and the preparation of environmental impact reports and negative declarations." *Id.* The Guidelines are transmitted to the Secretary for Resources, who certifies and adopts them pursuant to the provisions of the Administrative Procedure Act. *Id.* In 1983, a complete revision of the CEQA Guidelines was approved by the Office of Administrative Law. The new Guidelines became effective August 1, 1983.

[33] The Guidelines for Implementation of the California Environmental Quality Act, CAL. ADMIN. CODE tit. 14, §§ 15000-15387 (1983) [hereafter State EIR Guidelines].

[34] CEQA's federal counterpart, NEPA, has a similar aim. *See* L. CALDWELL, SCIENCE AND THE NATIONAL ENVIRONMENTAL POLICY ACT: REDIRECTING POLICY THROUGH PROCEDURAL REFORM (1982).

[35] *See* CAL. ADMIN. CODE tit. 14, § 15002(a) (1983) (one of CEQA's basic purposes is to inform government decisionmakers about potential environmental effects).

At the federal level, the courts have taken a strong and active role in enforcing these laws, compelling agencies to take a "hard look" at environmental problems and ordering compliance with a wide variety of statutes.[36] That same judicial activism quickly appeared in CEQA cases. The courts concluded that agency compliance with CEQA's mandate was subject to judicial scrutiny and that injunctive relief was available to remedy violations.[37] Seizing this opportunity, private citizens and environmental groups,[38] public agencies,[39] and even some business and labor interests have initiated litigation.[40]

Many of the cases brought in the first half of the 1970's raised issues regarding the effective date of CEQA and certain "grandfather" provisions that excluded some projects from CEQA compliance.[41] A large number of these early cases also defined the exemptions from CEQA's

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[36] *See generally* W. RODGERS, ENVIRONMENTAL LAW 16-23 (1977); Marcel, *The Role of the Courts in a Legislative and Administrative System: The Use of the Hard Look Doctrine in Federal Environmental Litigation*, 62 OR. L. REV. 403 (1983).

[37] Environmental Defense Fund, Inc. v. Coastside County Water Dist., 27 Cal. App. 3d 695, 104 Cal. Rptr. 197 (1972). The court found that the "ancient and purposeful instrument of injunction" was available as a remedy. *Id.* at 704, 104 Cal. Rptr. at 202. While this case was brought as a complaint for injunctive relief, most CEQA litigation involves petitions for writs of mandate. Unless otherwise noted, in this Article, the terms "plaintiff" and "petitioner" as well as "defendant" and "respondent" are used interchangeably.

[38] *See, e.g.*, Society for Cal. Archaeology v. County of Butte, 65 Cal. App. 3d 832, 135 Cal. Rptr. 679 (1977).

[39] *See, e.g.*, County of Inyo v. City of Los Angeles, 124 Cal. App. 3d 1, 177 Cal. Rptr. 479 (1981).

[40] *See, e.g.*, International Longshoremen's & Warehousemen's Union, Local 35 v. Board of Supervisors, 116 Cal. App. 3d 265, 171 Cal. Rptr. 875 (1981); Building Code Action v. Energy Resources Conservation & Dev. Comm'n, 102 Cal. App. 3d 577, 162 Cal. Rptr. 734 (1980).

[41] *See, e.g.*, Simons v. City of Los Angeles, 72 Cal. App. 3d 924, 140 Cal. Rptr. 484 (1977); Cooper v. County of Los Angeles, 69 Cal. App. 3d 529, 138 Cal. Rptr. 229 (1977); Save Our Skyline v. Board of Permit Appeals, 60 Cal. App. 3d 512, 131 Cal. Rptr. 570 (1976); Cooper v. County of Los Angeles, 49 Cal. App. 3d 34, 122 Cal. Rptr. 464 (1975); Bresnahan v. City of Pasadena, 48 Cal. App. 3d 297, 121 Cal. Rptr. 750 (1975); People *ex rel.* Dep't of Pub. Works v. Bosio, 47 Cal. App. 3d 495, 121 Cal. Rptr. 375 (1975); Pacific Palisades Property Owners Ass'n v. City of Los Angeles, 42 Cal. App. 3d 781, 117 Cal. Rptr. 138 (1974); People v. County of Kern, 39 Cal. App. 3d 830, 115 Cal. Rptr. 67 (1974); Friends of Lake Arrowhead v. Board of Supervisors, 38 Cal. App. 3d 497, 113 Cal. Rptr. 539 (1974); County of Inyo v. Yorty, 32 Cal. App. 3d 795, 108 Cal. Rptr. 377 (1973); San Francisco Planning & Urban Renewal Ass'n v. Central Permit Bureau, 30 Cal. App. 3d 920, 106 Cal. Rptr. 670 (1973); County of Orange v. Heim, 30 Cal. App. 3d 694, 106 Cal. Rptr. 825 (1973).

mandates.[42] Others focused on the requirement that the public agency must take a "discretionary" rather than "ministerial" action for CEQA to apply.[43]

Although of little significance to the overall development of the Act, these cases highlighted two important factors. First, in many instances the California courts relied on federal court precedents under NEPA to construe CEQA's statutory provisions.[44] Thus, although some questions concerning CEQA's scope might remain unsettled, reference to NEPA precedents would provide a fairly reliable indication of the law's future direction. Furthermore, state courts would follow their federal counterparts and take a strong role in enforcing the EIR requirement.

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[42] A 1979 study estimated that 45% of the discretionary projects reviewed in sample jurisdictions were not subject to formal environmental review because of exemptions or other reasons. SMALL & KNURST, INC., CALIFORNIA LOCAL GOVERNMENT AND CEQA 1979: A REPORT SUBMITTED TO THE ASSEMBLY COMMITTEE ON RULES 9 (1980); *see also* Industrial Welfare Comm'n v. Superior Court, 27 Cal. 3d 690, 613 P.2d 579, 166 Cal. Rptr. 331 (1980) (wage orders of commission exempt); Fillmore Condit v. Solvang Mun. Improvement Dist., 146 Cal. App. 3d 997, 194 Cal. Rptr. 683 (1983) (CEQA does not apply to modification of water rates and fees); Seghesio v. County of Napa, 135 Cal. App. 3d 371, 185 Cal. Rptr. 224 (1982) (timber harvest plan exempt from local EIR process); International Longshoremen's & Warehousemen's Union, Local 35 v. Board of Supervisors, 116 Cal. App. 3d 265, 171 Cal. Rptr. 875 (1981) (approval of mining plant not exempt); Simons v. City of Los Angeles, 72 Cal. App. 3d 924, 140 Cal. Rptr. 484 (1977) (city police training exempt); Edna Valley Ass'n v. San Luis Obispo Coordinating Council, 67 Cal. App. 3d 444, 136 Cal. Rptr. 665 (1977) (regional transportation plan not exempt); Myers v. Board of Supervisors, 58 Cal. App. 3d 413, 129 Cal. Rptr. 902 (1976) (division of land into three smaller parcels not exempt); Topanga Beach Renters Ass'n v. Department of Gen. Serv., 58 Cal. App. 3d 188, 129 Cal. Rptr. 739 (1976) (exemption of demolition project a triable issue); Erven v. Board of Supervisors, 53 Cal. App. 3d 1004, 126 Cal. Rptr. 285 (1975) (decision to provide road improvement and maintenance exempt).

[43] *See, e.g.*, Environmental Law Fund, Inc. v. City of Watsonville, 124 Cal. App. 3d 711, 177 Cal. Rptr. 542 (1981) (issuance of demolition permit ministerial); Starbird v. County of San Benito, 122 Cal. App. 3d 657, 176 Cal. Rptr. 149 (1981) (use permit requires discretionary review); San Diego Trust & Sav. Bank v. Friends of Gill, 121 Cal. App. 3d 203, 174 Cal. Rptr. 784 (1981) (demolition permit discretionary); Stein v. City of Santa Monica, 110 Cal. App. 3d 458, 168 Cal. Rptr. 39 (1980) (submission of rent control charter amendment to voters ministerial); Day v. City of Glendale, 51 Cal. App. 3d 817, 124 Cal. Rptr. 569 (1975) (grading permit discretionary); People v. Department of Hous. & Community Dev., 45 Cal. App. 3d 185, 119 Cal. Rptr. 266 (1975) (permit to construct trailer park partially discretionary).

[44] The first California Supreme Court case on CEQA, Friends of Mammoth v. Board of Supervisors, 8 Cal. 3d 247, 259-62, 502 P.2d 1049, 1056-59, 104 Cal. Rptr. 761, 768-71 (1972), recognized that because the Act was patterned after NEPA, precedents of the federal courts construing the federal law would be persuasive in interpreting CEQA.

Second, the threat of judicial enforcement that these decisions represent had a marked effect on compliance with CEQA by fostering a "preventative law" attitude on the part of attorneys representing public agencies.[45] Participants in the CEQA process often have commented on this effect, even describing it as an "exaggerated fear of litigation."[46] Unfortunately, this preoccupation with "prevention" often takes the shape of bulky, all-inclusive environmental documents designed to withstand possible court challenge. This situation has led to the universally acknowledged conclusion that EIR's — documents intended to convey information — are often difficult to read.[47]

The most significant CEQA issues that the California courts have addressed since its passage can be grouped into three categories. First, how should the courts review the important threshold determination whether an EIR is required? Second, if a report was prepared, to what extent should the courts examine the adequacy of its conclusions? Finally, what substantive effect would CEQA have?

After more than fourteen years of litigation, these questions can be answered with some confidence. With respect to the threshold question issues, the courts have divided sharply, with only a semblance of consensus appearing in the last three years. The courts have shown a disinclination to second-guess the adequacy of EIR's, with only two noteworthy exceptions: the discussion of "cumulative impacts" and responses to public comments on environmental impact. The courts' attitude toward "cumulative impacts" appears to be more a function of

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[45] *See* R. Stein, Presentation to the 1983 Planning Commissioners Institute, League of California Cities 14 (declaring with respect to a discussion of whether a negative declaration is appropriate: "Let me say at this point, when in doubt, require an EIR!") (copy on file with author).

[46] For example, in an article discussing the manner in which environmental impact statements prepared under NEPA could be used to comply with CEQA, the editor of the California EIR Monitor commented: "It also appears that an exaggerated fear of litigation has often led to an overly rigid compliance with the letter of the law or the guidelines in a way that only increases the costs and delays involved with the projects." *Interchange of Documents Between NEPA and CEQA*, CAL. EIR MONITOR, Feb. 22, 1977, at 3. A consultant specializing in preparation of EIR's also noted recently that "[t]he threat of litigation is, in my opinion, the most critical influence on rational compliance with CEQA." Remarks of Andi Adams, Vice-President, Culbertson, Adams & Associates, transmitted to Assemblymember Terry Goggin, Chair, Assembly Natural Resources Comm. 1 (July 15, 1983) (copy on file with author).

[47] *See* Jones, *What is This Thing Called a 'Focused EIR?'*, NEWSLETTER A. OF ENVTL. PROF., *reprinted in* CAL. EIR MONITOR, May 8, 1979, at 1 (noting "complaints about bulk, verbosity, and scientific trivia (with the resulting high costs of preparation)") (parentheses in original).

the facts of the cases decided and, in the long run, probably will indicate an approach similar to other "adequacy" issues. The courts' treatment of responses to comments, however, is far more significant, signaling an important judicial gloss on CEQA. Finally, while the courts have demonstrated a willingness to perform their traditional function of reviewing an agency's findings of fact under accepted administrative law principles, the courts have not yet attached a firm substantive effect to CEQA's mandate. Accordingly, the extent to which the Act constrains substantive decisionmaking is uncertain. In almost every area of CEQA case law, however, one theme is obvious: the continued impact of a small number of key California Supreme Court decisions.

B. The Interpretive Principle: Maximum Environmental Protection

The California Supreme Court's reputation as an activist court on environmental issues was established during the 1970's when it handed down a number of decisions nationally recognized as important. An intensive study of the court's opinions during this period concluded that they were perceived as significant by those outside the state because they are "on the cutting edge of preservationism."[48] The study also found that the court's decisions involving CEQA were representative of this trend, since they "interpreted the Act in a broad manner highly protective of the environment."[49]

As of mid-1984, eleven California Supreme Court opinions squarely addressed CEQA issues, with four significantly outlining the Act's requirements.[50] The first, and clearly the most momentous, was the

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[48] DiMento, Dozier, Emmons, Hagman, Kim, Greenfield-Sanders, Waldau & Woolacott, *Land Development and Environmental Control in the California Supreme Court: The Deferential, the Preservationist, and the Preservationist-Erratic Eras*, 27 UCLA L. REV. 859, 883 (1980).

[49] *Id.* at 905.

[50] The significant opinions are: Fullerton Joint Union High School Dist. v. State Bd. of Educ., 32 Cal. 3d 779, 654 P.2d 168, 187 Cal. Rptr. 398 (1982); Bozung v. Local Agency Formation Comm'n, 13 Cal. 3d 263, 529 P.2d 1017, 118 Cal. Rptr. 249 (1975); No Oil, Inc. v. City of Los Angeles, 13 Cal. 3d 68, 529 P.2d 66, 118 Cal. Rptr. 34 (1974); and Friends of Mammoth v. Board of Supervisors, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972). A fifth opinion, Wildlife Alive v. Chickering, 18 Cal. 3d 190, 553 P.2d 537, 132 Cal. Rptr. 377 (1976), concerned the potential exemption of fixing hunting and fishing seasons by the State Fish and Game Commission. Other California Supreme Court opinions of lesser importance are: Industrial Welfare Comm'n v. Superior Court, 27 Cal. 3d 690, 613 P.2d 579, 166 Cal. Rptr. 331, *cert. denied*, 449 U.S. 1029 (1980); Woodland Hills Residents Ass'n v. City Council, 26 Cal. 3d 938, 609 P.2d 1029, 164 Cal. Rptr. 255 (1980); Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510 (1980) (concerning first

court's decision in *Friends of Mammoth v. Board of Supervisors.*[51] *Friends of Mammoth* is best known for its result, which applied CEQA to a wide variety of private development proposals. However, equally influential was the court's approach to resolving the issue of statutory construction before it. This approach has provided a framework affecting numerous later California appellate decisions.

The issue in *Friends of Mammoth* was whether CEQA applies when a public agency approves a private development by issuing a conditional use or building permit. At the time, CEQA declared that, with certain exceptions, local government agencies "shall make an environmental impact report on any project they intend to carry out which may have significant effect on the environment."[52] The specific question of statutory interpretation before the court was whether the issuance of a conditional use permit was a project that the Mono County Board of Supervisors had "carried out," thereby triggering the EIR process, or whether only a public works project could be "carried out."[53]

The court decided that approval of the permit was a project, a holding that greatly expanded the Act's application and unleashed a wave of controversy. Land development interests decried the decision, claiming that "the survival of the building industry and the economic well-being of the whole State had been put in jeopardy."[54] The debate centered on two issues: whether the application of CEQA to private development approvals should be legislatively overturned, and how projects in various stages of approval should be treated when the developers had proceeded in good faith on the belief of CEQA's inapplicability. Ultimately, the legislature passed Assembly Bill 889 to resolve the first of these issues, codifying the holding that CEQA applies to private projects and enacting other substantial changes to CEQA's provisions.[55]

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amendment issues), *rev'd*, 453 U.S. 490 (1981); Horn v. County of Ventura, 24 Cal. 3d 605, 596 P.2d 1134, 156 Cal. Rptr. 718 (1979); Citizens Task Force on SOHIO v. Board of Harbor Comm'rs, 23 Cal. 3d 812, 591 P.2d 1236, 153 Cal. Rptr. 584 (1979); Desert Env't Conservation Ass'n v. Public Utils. Comm'n, 8 Cal. 3d 739, 505 P.2d 223, 106 Cal. Rptr. 31 (1973). Several other California Supreme Court opinions cite CEQA in passing. *See, e.g.*, People ex rel. Deukmejian v. County of Mendocino, 36 Cal. 3d 476, 683 P.2d 1150, 204 Cal. Rptr. 897 (1984).

[51] 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972).

[52] Act of Sept. 18, 1970, ch. 1433, 1970 Cal. Stat. 2783 (codified at then CAL. PUB. RES. CODE § 21151).

[53] 8 Cal. 3d. at 256, 259, 502 P.2d at 1054, 1056, 104 Cal. Rptr. at 766, 768.

[54] T. TRYZNA & A. JOKELA, *supra* note 11, at 26.

[55] The *Friends of Mammoth* decision and the political events that followed, ultimately leading to the passage of Assembly Bill 889, are discussed at length in T. TRYZNA & A. JOKELA, *supra* note 11, at 25-40. Among other provisions, Assembly

The court's reasoning in *Friends of Mammoth* has been uniquely influential. The court based its decision on the legislature's intent, concluding that when assessing the scope of the Act, CEQA is "to be interpreted . . . to afford the fullest possible protection to the environment within the reasonable scope of the statutory language."[56] The court also approved language used by the United States Court of Appeals for the District of Columbia Circuit in a NEPA decision, which stated that the "judicial role is active" in such cases.[57]

This interpretation of legislative intent has, more than any other single factor, affected lower court decisions construing CEQA's requirements. Instead of emphasizing traditional principles of administrative law — for example, the presumption of agency regularity in its actions, or deference to the decisions and interpretation given a statute by the agency administering it[58] — the court decreed that legislative expressions of intent must be given maximum priority. The effect this would have on review of CEQA issues by intermediate California appellate courts is obvious. For example, in deciding whether a type of public agency action is exempt from CEQA, the *Friends of Mammoth* maxim could tip the balance toward a decision applying the Act's regulatory requirements.[59]

One of the principal indicators of legislative intent relied on by the

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Bill 889, Act of Dec. 5, 1972, ch. 1154, 1972 Cal. Stat. 2271 (codified at scattered sections of CAL. PUB. RES. CODE): (1) codified the *Friends of Mammoth* holding that the Act applied to private projects; (2) established a 120-day moratorium on CEQA's application to private projects and validated earlier projects through a grandfather clause; (3) defined numerous terms such as "environment" and "significant effect"; and (4) provided standards for judicial review.

[56] 8 Cal. 3d at 259, 502 P.2d at 1056, 104 Cal. Rptr. at 768.

[57] *Id.* at 261, 502 P.2d at 1058, 104 Cal. Rptr. at 770 (citing the leading federal case of Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n, 449 F.2d 1109, 1111 (D.C. Cir. 1971)).

[58] CAL. EVID. CODE § 664 (West 1966) establishes a presumption that the administrative agency has regularly performed its official duty. *See also* Rivera v. Division of Indus. Welfare, 265 Cal. App. 2d 576, 594, 71 Cal. Rptr. 739, 755 (1968) (administrative agency action has presumption of correctness and regularity); W. DEERING, CALIFORNIA ADMINISTRATIVE MANDAMUS § 13.3, at 217-18 (1966).

[59] *See, e.g.*, Guardians of Turlock's Integrity v. Turlock City Council, 149 Cal. App. 3d 584, 197 Cal. Rptr. 303 (1983) (citing *Friends of Mammoth* in holding that statewide review was required for a project); *see also* PROCEEDINGS OF THE CALIFORNIA ENVIRONMENTAL IMPACT LAW CONFERENCE 7 (transcript of proceedings at U.C. Davis, Apr. 7, 1973) (statement of Thomas H. Willoughby) ("Those who want to read between the lines of the [*Mammoth*] decision may also detect a none-too-subtle judgment by the Court about the tendency of the legislature to indulge in hyperbole when it's describing the intent and purpose of its own enactments.").

court was the statement in Public Resources Code section 21001(d) that the state's policy is to "[e]nsure that the long-term protection of the environment . . . shall be the guiding criterion in public decisions."[60] This strikingly powerful statement, if broadly applied, would reprioritize much governmental decisionmaking, particularly land use decisions by local governments. Holding CEQA inapplicable to private land development, the court reasoned, would be inconsistent with this principle.[61]

Perhaps belatedly recognizing the force of its initial choice of words, the legislature has amended this statement of intent to include the qualifying phrase "consistent with the provisions of a decent home and living environment for every Californian."[62] However, this change has not affected subsequent reliance on the *Friends of Mammoth* interpretive principle for two reasons. First, although section 21001(d) contained the most obvious source of legislative intent to protect the environment, the *Friends of Mammoth* decision also found support for its holding in numerous other expressions of intent.[63] Accordingly, the subsequent legislative change to section 21001(d) would not affect the overall result. Second, a broad application of the procedural provisions of the Act may be consistent with providing housing for every Californian.[64]

C. Outlining the Parameters of the Act

With the *Friends of Mammoth* decision and the passage of Assembly Bill 889, CEQA took a quantum leap forward as a tool for protecting the environment. But, given the Act's vague language about projects having a "significant impact" on the environment, the potential for administrative discretion in applying the Act persisted. While the *Friends of Mammoth* court indicated that abuse of the significant effect provisions as a subterfuge for avoiding the EIR requirement "would not be countenanced,"[65] the court also observed that the majority of private

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[60] 8 Cal. 3d at 257, 502 P.2d at 1055, 104 Cal. Rptr. at 767 (citing CAL. PUB. RES. CODE § 21001(d) (West 1977 & Supp. 1984)).

[61] *Id.* at 256-57, 502 P.2d. at 1054-55, 104 Cal. Rptr. at 766-67.

[62] Act of Sept. 22, 1979, ch. 947, § 5, 1979 Cal. Stat. 3269, 3271. The section now reads that it is the policy of the state to: "(d) Ensure that the long-term protection of the environment, consistent with the provision of a decent home and suitable living environment for every Californian, shall be the guiding criterion in public decisions." CAL. PUB. RES. CODE § 21001(d) (West Supp. 1984).

[63] *See* 8 Cal. 3d at 256-67, 502 P.2d at 1054-55, 104 Cal. Rptr. at 766-67.

[64] For an analysis of CEQA's effect on housing, see generally F. CASE & J. GALE, ENVIRONMENTAL IMPACT REVIEW AND HOUSING (1982).

[65] 8 Cal. 3d at 271, 502 P.2d at 1065, 104 Cal. Rptr. at 777.

projects for which a government permit is involved could be approved exactly as before CEQA's enactment.[66] As these statements indicate, the full parameters of the Act had not yet been defined.

A further decision attempting to delineate CEQA's scope followed shortly. In *No Oil, Inc. v. City of Los Angeles*,[67] the supreme court reviewed a decision by the City Council of Los Angeles not to prepare an EIR on a zoning ordinance that would authorize exploratory drilling for oil. The very practical question underlying the litigation was whether local agencies could avoid the EIR requirement by determining that the project in question could not have a significant effect on the environment.[68] The court cited the *Friends of Mammoth* interpretive principle in concluding that the interpretation of the Act which would afford the fullest possible protection to the environment "is one which will impose a low threshold requirement for preparation of an EIR."[69] The court termed the test formulated by the trial court — whether there is a "reasonable possibility that the project will have a momentous or important effect of a permanent or long enduring nature" — as one that "affords not the fullest, but the least possible protection to the environment within the statutory language."[70] Instead, an EIR is required whenever the agency perceives some substantial evidence that the project may have a significant effect on the environment, or "whenever the action *arguably* will have an adverse environmental impact."[71] The statute should not be construed to allow the agency to make its decision in a doubtful case without receiving and analyzing the relevant data.[72]

Friends of Mammoth and *No Oil* thus established an expansive standard of what constitutes "significant effect." However, the other statutory language requiring clarification concerned the types of governmental activities that would constitute projects, thereby triggering the need to examine the possibility of a significant environmental impact. Two later California Supreme Court decisions, *Bozung v. Local Agency Formation Commission*[73] and *Fullerton Joint Union High School District v.*

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[66] *Id.* at 272-73, 502 P.2d at 1065, 104 Cal. Rptr. at 777.

[67] 13 Cal. 3d 68, 529 P.2d 66, 118 Cal. Rptr. 34 (1974).

[68] *Id.* at 79, 529 P.2d at 73, 118 Cal. Rptr. at 41.

[69] *Id.* at 84, 529 P.2d at 76, 118 Cal. Rptr. at 44.

[70] *Id.* at 85, 529 P.2d at 77, 118 Cal. Rptr. at 45.

[71] *Id.* (quoting Students Challenging Regulatory Agency Procedures v. United States, 346 F. Supp. 189, 201 (D.D.C. 1972) (emphasis in original).

[72] *Id.* at 84, 529 P.2d at 76-77, 118 Cal. Rptr. at 44-45.

[73] 13 Cal. 3d 263, 529 P.2d 1017, 118 Cal. Rptr. 249 (1975).

State Board of Education,[74] provided guidance in this area. By this time, the legislature had defined project in Public Resources Code section 21065 to include activities "directly undertaken by any public agency" and activities "involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies."[75] In *Bozung*, the court decided that the approval of an annexation pursuant to the Knox-Nisbet Act was a project under these two definitions. The court found that the approval fit within the definitions because the activity was directly undertaken by a public agency, and because it involved the issuance of an entitlement to a person.[76] Similarly, in *Fullerton*, the approval of a secession plan by the State Board of Education constituted a project.[77]

These decisions highlight the all-encompassing nature of projects falling within the ambit of the Act. Almost every conceivable action taken by a governmental agency is an activity either directly undertaken by a public agency or involving an entitlement for use.[78] Although further implementation of CEQA's procedural provisions through an EIR might be unnecessary (for example, if the project would not have a significant environmental impact), attempted evasion of the Act's requirements by defining activities as non-projects would be unsuccessful. In short, the supreme court's decisions in *Friends of Mammoth*, *No Oil*, *Bozung*, and *Fullerton* defined the parameters of CEQA's applicability in the broadest possible manner.

At the same time, these decisions were the fount of much of the dis-

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[74] 32 Cal. 3d 779, 654 P.2d 168, 187 Cal. Rptr. 398 (1982).

[75] CAL. PUB. RES. CODE § 21065 (West 1977) (discussion of § 21065(b) has been omitted from this definition; this subsection is rarely applicable to local agency action and is not discussed in detail here).

[76] 13 Cal. 3d at 278-79, 529 P.2d at 1027, 118 Cal. Rptr. at 259 ("We agree with plaintiffs and the Attorney General that an approval of an annexation to a city is covered both by subdivision (a) and subdivision (c) of section 21065.").

[77] 32 Cal. 3d at 797, 654 P.2d at 180, 187 Cal. Rptr. at 410 ("[The approval of the secession plan] is therefore under the reasoning of *Bozung* and *Simi Valley* a 'project' within the scope of CEQA.").

[78] *See infra* part III A. Additionally, in Wildlife Alive v. Chickering, 18 Cal. 3d 190, 553 P.2d 537, 132 Cal. Rptr. 377 (1976), the court cited the *Friends of Mammoth* interpretive principle in concluding that the California Fish and Game Commission was not exempt from CEQA compliance in setting the hunting season for black bears. The court's refusal to find an implied exemption from CEQA prevented attempts to construe CEQA exemptions broadly. *See, e.g.*, International Longshoreman's & Warehousemen's Union, Local 35 v. Board of Supervisors, 116 Cal. App. 3d 265, 171 Cal. Rptr. 875 (1981) (amendment to an air pollution control district rule that allowed increases in nitrogen oxides levels not exempt from CEQA).

satisfaction with CEQA that has surfaced over the years. Broad application of the Act's requirements carries with it bureaucratic baggage in the form of greatly increased paperwork. Further, the interpretation of project by the supreme court requires public agencies to examine almost every action they take for possible environmental consequences. These include actions that, on their face, might seem to have little environmental importance. The broad interpretation also increased the power of government bureaucracies in their dealings with private applicants. By necessity, most public agencies must rely heavily on staff recommendations in determining how to comply with CEQA. Faced with the delay and cost of an EIR, applicants often become willing to tailor their projects through "mitigation measures" to suit the wishes of a planning department if, in turn, the department will recommend that a full EIR is unnecessary for the project as mitigated. All of these developments did not sit well with a regulated community facing increasingly long lead times on projects.

One final supreme court decision, *Woodland Hills Residents Association v. City Council*,[79] deserves recognition. Although the case was not concerned with CEQA's parameters, it confirmed the public participation purposes contained in CEQA. The court sustained a claim by petitioners that the City of Los Angeles was required to consult with members of the public before preparation of a draft EIR, overturning a subdivision approval because the city "had failed to seek the citizens' comments in time to influence the preparation and content of the draft EIR."[80]

The specific holding of *Woodland Hills* requiring consultation with members of the public prior to drafting environmental documents was later legislatively overruled.[81] The practical difficulties of implementing this concept — for example, location of the appropriate members of the public — are apparent.[82] Nonetheless, the case gives the supreme court's imprimatur to another central CEQA principle: the "privileged position" that members of the public hold in the CEQA process. As will be demonstrated below,[83] that position is based on a belief that citizens can make important contributions to environmental protection

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[79] 26 Cal. 3d 938, 609 P.2d 1029, 164 Cal. Rptr. 255 (1980).

[80] *Id.* at 949, 609 P.2d at 1035, 164 Cal. Rptr. at 262.

[81] Act of Sept. 15, 1981, ch. 480, §§ 2, 4, 1981 Cal. Stat. 1823, 1823-24 (codified at CAL. PUB. RES. CODE § 21082.1 (West Supp. 1984)).

[82] For example, the decision raised questions about which individuals or groups were entitled to be consulted, how notice should be given, and how their views should be accommodated in the EIR.

[83] *See infra* text accompanying notes 144-49.

and on notions of democratic decisionmaking, concepts that the courts of appeal have embraced wholeheartedly.

To summarize, the supreme court established an outline of CEQA implementation that ensures the broadest application of the Act. Having accomplished this, the court has not accepted other cases that might have defined the standards for measuring the adequacy of analyses contained in environmental documents. In fact, since the court's 1977 decision in *Citizens Task Force on SOHIO v. Board of Harbor Commissioners*,[84] a case solely concerned with identifying the proper "lead agency" with general responsibility for preparing an EIR, the court has not decided any case that raised a CEQA question as the principal issue.[85] Accordingly, the task of filling in the contours of the supreme court's general outline has fallen to the courts of appeal. For the most part, their decisions have faithfully followed the tenor of CEQA interpretation found in the supreme court case law.

III. Issues Concerning Threshold Questions

A determination that CEQA applies to a project may require the preparation of an EIR, with the delay and cost that effort entails. As a result, the courts of appeal often have faced situations in which parties to litigation disagree over "threshold questions" of CEQA's applicability to a government approval. A number of these cases concerned whether an activity to be approved by a state or local government was a project. Other decisions, however, addressed the more difficult question of how the courts review a public agency determination under the *No Oil* test that a project does not require an EIR because it will not have a significant environmental effect. Despite some confusion, the first question has been relatively easy for the courts, equipped with the *Bozung* and *Fullerton* decisions, to handle. The second, however, has resulted in a split in the courts of appeal. While this second issue apparently has now been settled by the passage in 1983 of Assembly Bill 1462, further litigation in the area can be anticipated.

A. Public Agency Actions as Projects

As noted above, CEQA provides a three-fold definition of the term "project": "(a) [a]ctivities directly undertaken by any public agency. (b) [a]ctivities undertaken by a person which are supported in whole or in

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[84] 23 Cal. 3d 812, 591 P.2d 1236, 153 Cal. Rptr. 584 (1979).

[85] Although both *Fullerton* and *Woodland Hills* raised CEQA issues, they also concerned other, broader issues to which most of the opinions were devoted.

part through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies. [and] (c) [a]ctivities involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies."[86] The definition is relatively straightforward, and the courts have had little difficulty applying the concept. Projects under CEQA include adopting a zoning ordinance,[87] leasing a building,[88] approving a timber harvesting plan,[89] approving an increase in bus fares,[90] and amending a city's general plan.[91]

The only real difficulty has been determining whether an annexation with no foreseeable environmental impacts is a project. In *Simi Valley Recreation & Park District v. Local Agency Formation Commission*,[92] the court of appeal found that a detachment from a park district approved by both the local agency formation commission and the Board of Supervisors was not a project under CEQA, rendering compliance with CEQA unnecessary. The court first stated that, under the *Friends of Mammoth* decision, a project requires "some minimal link with the activity, either by direct proprietary interest or by permitting, regulating, or funding private activity."[93] This required minimal link is that the

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[86] CAL. PUB. RES. CODE § 21065 (West 1977); *see also* 66 Op. Cal. Att'y Gen. 340, 342 (1983) (observing that a project under CEQA is defined broadly).

[87] Rosenthal v. Board of Supervisors, 44 Cal. App. 3d 815, 119 Cal. Rptr. 282 (1975).

[88] City of Orange v. Valenti, 37 Cal. App. 3d 240, 112 Cal. Rptr. 379 (1974).

[89] Natural Resources Defense Council, Inc. v. Arcata Nat'l Corp., 59 Cal. App. 3d 959, 131 Cal. Rptr. 172 (1976).

[90] Shawn v. Golden Gate Bridge Dist., 60 Cal. App. 3d 699, 131 Cal. Rptr. 867 (1976). *But see* CAL. PUB. RES. CODE § 21080(b)(8) (West Supp. 1984) (exempting certain fares charged by public agencies from CEQA).

[91] City of Santa Ana v. City of Garden Grove, 100 Cal. App. 3d 521, 160 Cal. Rptr. 907 (1979). One court of appeal case found that a school closing was not a project under CEQA. Prentiss v. Board of Educ., 111 Cal. App. 3d 847, 131 Cal. Rptr. 867 (1982). The supreme court termed that holding questionable in *Fullerton*, 32 Cal. 3d at 796 n.16, 654 P.2d at 179 n.16, 187 Cal. Rptr. at 409 n.16. The closure undoubtedly is an activity undertaken by a public agency and, under the *Simi* approach, could have a significant environmental effect. However, 1984 legislation has exempted "the closing of any public school in which kindergarten or any of grades 1 through 12 is maintained" from CEQA. Act of Sept. 18, 1984, ch. 1250, 1984 Cal. Legis. Serv. 701, 703 (West); *see also* Pistoresi v. City of Madera, 138 Cal. App. 3d 284, 188 Cal. Rptr. 136 (1982) (Because annexation is a prerequisite for the proposed development, approval of the annexation is a project, and *Bozung* rather than *Simi Valley* controls.).

[92] 51 Cal. App. 3d 648, 124 Cal. Rptr. 635 (1975).

[93] *Id.* at 664, 124 Cal. Rptr. at 646 (quoting *Friends of Mammoth*, 8 Cal. 3d at 262-63, 502 P.2d at 1059, 104 Cal. Rptr. at 771).

public agency take an action "necessary to the carrying out of some private project involving a physical change in the environment."[94] Because the detachment in the *Simi Valley* case did not make any change in the uses to which the land might be put, there was no project.[95]

The *Simi Valley* case puts a slight gloss on CEQA's statutory definition of project. As the supreme court in *Bozung* pointed out, CEQA proceeds on a "step-by-step basis by first defining 'project' [in section 21065] so broadly that it covers activities having no conceivable effect on the environment."[96] The Act then defines the scope of its application, including discretionary projects in this definition, but excluding "ministerial" activities that the public agency must approve. Finally, in the third step,[97] CEQA specifies what actions the affected agencies must take when dealing with projects that "may have a significant effect on the environment."[98]

Simi Valley alters this statutory framework, and thereby narrows the definition of project, by partially consolidating the first and third of these steps. In contrast, the statutory definition of a project found in the Act — activities "directly undertaken by any public agency" or "involving the issuance of a lease, permit, license, certificate, or other entitlement for use" — leaves the question of possible impact on the environment to be considered after the existence of a project is ascertained.[99] The State EIR Guidelines follow the *Simi Valley* language, defining project as an action "resulting in physical impact on the environment, directly or ultimately."[100]

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[94] The court stated:

> Except in cases where the government itself is engaged in a "public works type project," the required "minimal link with the activity" is that a government agency take action (in the nature of the issuance of a permit, the making or changing of a regulation, or the provision of funding) *necessary to the carrying out* of some private project involving a physical change in the environment.

Id. (emphasis added).

[95] *Id.* at 667, 124 Cal. Rptr. at 648.

[96] 13 Cal. 3d at 277 n.16, 529 P.2d at 1026 n.16, 118 Cal. Rptr. at 258 n.16.

[97] *Id.*

[98] *Id.*

[99] CAL. PUB. RES. CODE § 21065 (West 1977). Interestingly, despite its explanation of the statutory framework in *Bozung*, the supreme court in its 1982 *Fullerton* decision seemed to endorse the consolidation of the two steps. The court commented that a key issue in determining whether a project is before the agency is the existence of an "essential step culminating in action which may affect the environment." *Fullerton*, 32 Cal. 3d at 797, 654 P.2d at 180, 187 Cal. Rptr. at 410.

[100] CAL. ADMIN. CODE tit. 14, § 15378 (1983).

While the *Simi* approach is not as clear as it might be, the practical consequences of using it are small. If an agency uses the *Simi* approach to determine that an approval is not a project, no further agency action to comply with CEQA is necessary. The same result obtains if the agency follows the three-part *Bozung* approach by treating the approval as a project, but then finding that there is no possibility the project may have a significant impact on the environment. Further proceedings under CEQA also are unnecessary; there is no need, for example, to complete an initial study or other paperwork.

The only real difference in the two approaches lies in ease of interpretation. Conceptually, the three-part *Bozung* method is more logical. It first determines that a government approval exists and then focuses on the separate question of whether that determination somehow may affect the environment. This closely parallels the statutory definition of project, a definition that, as noted above, is not linked with the "significant effect" issue.

In summary, while the *Simi* case puts a slight gloss on case law that is otherwise consistent, the courts of appeal have had relatively little difficulty concluding that a wide variety of governmental activities are "projects" under CEQA. Much more difficulty has been experienced by the appellate courts in reviewing a succeeding step in the CEQA process, when a governmental agency finds that the project will not have any significant environmental impact and therefore does not need an EIR.

B. Judicial Review of Negative Declarations

1. The Framework for the Agency's Decision

Some of the more troublesome questions facing the courts have involved review of a decision to prepare a "negative declaration," a document used when a public agency conducts an initial study of a project and concludes that an EIR is unnecessary.[101] The first problem is one faced by the agency itself: what is a significant effect? The Act, amended after the *No Oil* decision, defines "significant effect on the environment" as a "substantial, or potentially substantial, adverse

[101] A "negative declaration" is defined by CAL. PUB. RES. CODE § 21064 (West 1977) as "a written statement briefly describing the reasons that a proposed project will not have a significant effect on the environment and does not require the preparation of an environmental impact report." *See* Asia Inv. Co. v. Borowski, 133 Cal. App. 3d 832, 184 Cal. Rptr. 317 (1982).

change in the environment."[102] The State EIR Guidelines provide some help in an appendix that lists effects that may be considered significant.[103]

Nonetheless, the terms "substantial" and "adverse" have qualitative aspects that make generalizations about their meaning difficult. The wide variety of contexts in which development approvals arise has led to a general consensus that further standardization of this term is impossible.[104] As a result, the determination whether an EIR is needed can vary from jurisdiction to jurisdiction, introducing uncertainty into the process.

In addition to determining what types of effects should be considered significant, the agency also must consider the appropriate legal standard to apply to evidence before it in the administrative record. That standard was expressed in two forms by the supreme court in *No Oil*: (1) whether there is "some substantial evidence that a project 'may have a significant effect environmentally,' " and (2) whether the action "arguably will have an adverse environmental impact."[105] Although meant to be complementary, these two formulations are not necessarily consistent. For example, under the second formulation a plausible "argument" may be made that a project could have an adverse environmental impact even if the administrative record contained no "substantial evidence" of significant environmental effects. The State EIR Guidelines attempt to clarify the test, defining "substantial evidence" as "enough relevant information and reasonable inferences from this information that a fair argument can be made."[106] They add that the entire record should be examined, including evidence presented by the public, and that "mere uncorroborated opinion or rumor does not con-

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[102] CAL. PUB. RES. CODE § 21068 (West 1977). The "environment" identified in this section has been held to be the environment of persons in general and not that of specific individuals who might somehow be affected. Markley v. City Council, 131 Cal. App. 3d 656, 182 Cal. Rptr. 659 (1982).

[103] CAL. ADMIN. CODE tit. 14, §§ 15000-15387 app. § G (1983).

[104] *See* STATE BAR CEQA REPORT, *supra* note 14, at 40 ("The standards in CEQA Guidelines Appendix G are qualitative, not quantitative. The reason is that it is difficult, if not impossible, to determine in advance how much is 'significant.' "). The report also notes the difficulty in setting fixed numbers of a statewide standard for environmental effects. *Id.*; *see also* Jones, *supra* note 47, at 2 (observing that environmental assessment is an "imprecise" activity).

[105] *No Oil*, 13 Cal. 3d at 85, 529 P.2d at 77, 118 Cal. Rptr. at 45 (quoting County of Inyo v. Yorty, 32 Cal. App. 3d 795, 809, 108 Cal. Rptr. 377, 387 (1973) and Students Challenging Regulatory Agency Procedures v. United States, 346 F. Supp. 189, 201 (D.D.C. 1972)).

[106] CAL. ADMIN. CODE tit. 14, § 15384(a) (1983).

stitute substantial evidence."[107]

Despite the Guidelines' assistance, a public agency's decision to order preparation of an EIR can be difficult. The project applicant, naturally wishing to avoid expense and delay, often argues strenuously that an EIR is unnecessary. At the same time, the agency often must make its decision on limited information, perhaps with citizens' groups urging preparation of a full EIR and threatening litigation. Under these circumstances it can come as no surprise that a significant amount of case law exists on this subject.

2. The Conflict in the Courts of Appeal

The principal issue facing appellate courts is the appropriate standard of review. Review of CEQA decisions is authorized by Public Resources Code sections 21168 and 21168.5. These statutes divide CEQA actions into two categories. The former applies to proceedings normally termed "quasi-judicial," in which a hearing is required, evidence is taken, and the agency acts as a factfinder.[108] Section 21168 directs the court to review these quasi-judicial proceedings pursuant to the provisions of Code of Civil Procedure section 1094.5, the general review statute for quasi-judicial decisions of California public agencies.[109]

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[107] *Id.*

[108] Section 21168 reads in full:

> Any action or proceeding to attack, review, set aside, void or annul a determination, finding, or decision of a public agency, made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in a public agency, on the grounds of non-compliance with the provisions of this division shall be in accordance with the provisions of Section 1094.5 of the Code of Civil Procedure.
>
> In any such action, the court shall not exercise its independent judgment on the evidence but shall only determine whether the act or decision is supported by substantial evidence in the light of the whole record.

CAL. PUB. RES. CODE § 21168 (West 1977).

[109] Code of Civil Procedure § 1094.5 provides in pertinent part:

> (b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

CAL. CIV. PROC. CODE § 1094.5(b) (West Supp. 1984). For a discussion of the elements of review under this section, see OFFICE OF PLANNING AND RESEARCH, BRIDGING THE GAP: USING FINDINGS IN LOCAL LAND USE DECISIONS 4-5 (1982) [hereafter BRIDGING THE GAP]; W. DEERING, CALIFORNIA ADMINISTRATIVE MANDAMUS §

All other actions taken pursuant to CEQA are reviewable under Public Resources Code section 21168.5. Quasi-legislative decisions made by a public agency fall under this section. The statute declares that the court's inquiry may extend only to whether there was a prejudicial abuse of discretion, defining two ways to establish an abuse: (1) if the agency has not proceeded in the manner required by law, or (2) if the decision is not supported by substantial evidence.[110]

In effect, both sections 21168 and 21168.5 use the same standard even though they apply to quasi-adjudicative and quasi-legislative actions respectively. The agency's action will be overturned only if it does not comply with the procedure required by law or is not supported by substantial evidence. The only possible difference between the two sections is that section 21168.5 may allow the trial court to receive evidence outside the administrative record. That argument is not available under section 21168 since it incorporates Code of Civil Procedure section 1094.5.[111]

In reviewing a decision to adopt a negative declaration, the courts theoretically have at least two approaches available. One possibility is to treat the decision of no significant impact as a factual determination reviewable under well-established substantial evidence rules, with the court presuming that the record contains evidence supporting a finding

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5.75 (1966 & Supp. 1984).

[110] Public Resources Code § 21168.5 reads:

> In any action or proceeding, other than an action or proceeding under Section 21168, to attack, review, set aside, void or annul a determination, finding, or decision of a public agency on the grounds of noncompliance with this division, the inquiry shall extend only to whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.

CAL. PUB. RES. CODE § 21168.5 (West 1977).

[111] CEQA cases generally turn on legal issues, for example: whether an explicit statutory command has been interpreted properly, whether a Guideline has been complied with, or whether proper findings have been made. If an agency makes a finding, the court may then determine whether it is supported by substantial evidence. Both § 21168 and § 21168.5 authorize review of whether the agency erred legally and whether there is substantial evidence to support the agency's conclusion. There is a question, however, whether outside evidence may be presented at trial under § 21168.5. *See* No Oil, Inc. v. City of Los Angeles, 13 Cal. 3d 68, 79 n.6, 529 P.2d 66, 73 n.6, 118 Cal. Rptr. 34, 41 n.6 (1974). Under the substantial evidence standard of CAL. CIV. PROC. CODE § 1094.5 (West Supp. 1984) (incorporated into CAL. PUB. RES. CODE § 21168 by reference), no outside evidence is allowed. The court must make its determination solely on the administrative record.

of fact.[112] A different approach would treat the determination as quasi-legal. A court would not defer to the agency's factual finding, but would make an independent review of the legal determination that there was no evidence upon which a fair argument could be made.

The approach chosen has significant consequences. For example, assume that a public agency must decide whether to adopt a negative declaration or prepare an EIR. One party has presented expert evidence to the agency that the project will not significantly impact the environment, while a second party presented evidence leading to the opposite conclusion. If the substantial evidence test is used, the agency's negative declaration will be sustained in spite of the conflicting evidence in the administrative record that a significant environmental impact will occur.[113] If the matter is treated as quasi-legal, the court on the identical set of facts is likely to order preparation of an EIR because the record contains evidence from which a fair argument can be made.

The California Supreme Court was ambiguous in *No Oil* concerning the appropriate approach, although it leaned more toward the quasi-legal method. The court reversed the city council's decision to forego an EIR because of its failure to proceed in the manner required by law. The court went on to order the preparation of an EIR because "[u]nder these circumstances, we believe that the council, employing a proper test, would have decided to direct preparation of an EIR."[114]

This part of the court's opinion seems to treat judicial review of a threshold determination not to prepare an EIR as a legal matter. The court reviewed the evidence and decided as a matter of law that an EIR

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[112] *See* CAL. CONT. EDUC. BAR, CALIFORNIA ADMINISTRATIVE MANDAMUS § 5.75, at 89-90 (1966); *see also* Hosford v. State Personnel Bd., 74 Cal. App. 3d 302, 307, 141 Cal. Rptr. 354, 356 (1977) (defining substantial evidence); CAL. EVID. CODE § 664 (West 1966 & Supp. 1984) ("It is presumed that official duty has been regularly performed.").

[113] Under the substantial evidence test, an agency's decision must be sustained if the evidence in the administrative record reasonably supports the agency's findings. Hosford v. State Personnel Bd., 74 Cal. App. 3d 302, 306-07, 141 Cal. Rptr. 354, 356 (1977). Although the reviewing court may not disregard contradictory evidence simply because support exists for the agency's conclusion, the substantial evidence rule precludes the court from overturning a finding on the basis that the opposite conclusion would have been equally or more reasonable. Mahdavi v. Fair Employment Practices Comm'n, 67 Cal. App. 3d 326, 340, 136 Cal. Rptr. 424, 427 (1977); *see also* Greenebaum v. City of Los Angeles, 153 Cal. App. 3d 391, 200 Cal. Rptr. 237 (1984). Furthermore, to be entitled to issuance of a writ of mandate, a petitioner must show "a clear, present, and beneficial right" to performance of that duty. CAL. CONT. EDUC. BAR, CALIFORNIA CIVIL WRITS § 5.17, at 72 (1970).

[114] 13 Cal. 3d at 88, 529 P.2d at 80, 118 Cal. Rptr. at 48.

was needed. If the issue was factual, the court would have remanded for a second city council determination, since the council had applied an erroneous standard in making its initial determination. That second factual finding then would have been subject to judicial review. However, the court also commented that it was not reaching the question whether the decision of "no significant impact" was supported by substantial evidence.[115] If the issue were purely a legal one, this statement would be unnecessary. Accordingly, the court may have implied that the "substantial evidence" test plays some unspecified role in the review of a threshold determination.

Early lower court decisions after *No Oil* followed a substantial evidence approach. In the leading case, *Pacific Water Conditioning Association v. City Council*,[116] the Fourth District Court of Appeal observed that the appropriate test was whether there was any substantial evidence, in light of the entire record, to support the agency's decision. Although there was evidence in *Pacific Water Conditioning* that a project limiting the discharge of certain chemicals into the city's sewage system might have a significant impact, the record also contained contrary evidence. Therefore, under the substantial evidence standard, the decision not to prepare an EIR was sustained.[117] The *Pacific Water Conditioning* court cited with approval an earlier court of appeal opinion, *Running Fence Corp. v. Superior Court.*[118] In *Running Fence*, the appellate court overturned a trial court decision premised on the theory that judicial review of a negative declaration was a matter of law.[119]

The *Pacific Water Conditioning* reasoning was later rejected by the First District Court of Appeal in *Friends of "B" Street v. City of Hayward.*[120] The *Friends of "B" Street* court found that the judicial function in reviewing a negative declaration is to determine "whether substantial evidence supported the agency's conclusion as to whether

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[115] The court stated:

> Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence. Since . . . the judgment of the superior court sustaining the city's decision must be reversed because of the city's failure to proceed in the manner required by law, we do not reach the question whether that decision is supported by substantial evidence.

Id. at 74-75, 529 P.2d at 70, 118 Cal. Rptr. at 38 (footnotes omitted).

[116] 73 Cal. App. 3d 546, 140 Cal. Rptr. 812 (1977).

[117] *Id.* at 553, 140 Cal. Rptr. at 815-16.

[118] 51 Cal. App. 3d 400, 124 Cal. Rptr. 339 (1975).

[119] *Id.* at 418-19, 124 Cal. Rptr. at 352-53.

[120] 106 Cal. App. 3d 988, 165 Cal. Rptr. 514 (1980). The author appeared on behalf of the California Attorney General as amicus curiae in this case.

the prescribed 'fair argument' could be made."[121] If the evidence in the record revealed that the project might have such impact, the agency action must be set aside because of failure to proceed in the manner required by law.[122]

The *Friends of "B" Street* court concluded that *Pacific Water Conditioning* improperly applied this standard when it determined that there was substantial evidence the proposed ordinance would not have a significant impact. Instead, the court "should have assessed the evidence to the contrary to determine whether it could be *fairly argued* that the ordinance might have such impact."[123] Thus, in contrast to *Pacific Water Conditioning*, the *Friends of "B" Street* court treated the question as a legal rather than factual determination.

Later decisions recognized the conflict in the opinions. In some instances they adopted the *Friends of "B" Street* approach,[124] while in others they declined to address the controversy, finding that a case could be decided without resolving the conflict.[125] No later decision on

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[121] *Id.* at 1002, 165 Cal. Rptr. at 522-23.

[122] The heart of the court's reasoning was the following statement:

> If there was substantial evidence that the proposed project might have a significant environmental impact, evidence to the contrary is not sufficient to support a decision to dispense with preparation of an EIR and adopt a negative declaration, because it could be "fairly argued" that the project might have a significant environmental impact. Stated another way, if the trial court perceives substantial evidence that the project might have such an impact, but the agency failed to secure preparation of the required EIR, the agency's action is to be set aside because the agency abused its discretion by failing to proceed "in the manner required by law."

Id. (quoting CAL. PUB. RES. CODE § 21168.5 (West 1977)).

[123] *Id.*

[124] In Brentwood Ass'n for No Drilling v. City of Los Angeles, 134 Cal. App. 3d 491, 184 Cal. Rptr. 664 (1982), the city argued that under *Pacific Water Conditioning*'s reasoning, the "trial court was bound to uphold the City Council's finding of no substantial or potentially substantial adverse effects . . . if the record before the City Council supported such a determination . . . even though evidence to the contrary may be found in the record." *Id.* at 503, 184 Cal. Rptr. at 671. The court rejected that standard in favor of the "far narrower" standard in *Friends of "B" St. Id.*; *see also* Pistoresi v. City of Madera, 138 Cal. App. 3d 284, 188 Cal. Rptr. 136 (1982) (followed *Friends of "B" St.*).

[125] In Perley v. Board of Supervisors, 137 Cal. App. 3d 424, 187 Cal. Rptr. 53 (1982), the court noted that the parties disagreed as to the proper standard of judicial review of an agency determination to adopt a negative declaration and summarized the conflicting viewpoints of *Pacific Water Conditioning* and *Friends of "B" St. Id.* at 433-34 n.4, 187 Cal. Rptr. at 58 n.4. The court described the "essential rationale" of *Friends of "B" St.* as:

> [It] appears to be that, since the Supreme Court's decision in *No Oil, Inc.*,

this issue, however, has cited *Pacific Water Conditioning* as setting forth the correct standard. Further, in a recent opinion, *Newberry Springs Water Association v. County of San Bernardino*,[126] the Fourth District itself appears sub silentio to have disavowed its reasoning in *Pacific Water Conditioning*. The court was reviewing a decision to prepare a negative declaration. Although the court commented that defendants had cited the *Pacific Water Conditioning* case, it apparently utilized the *Friends of "B" Street* approach to judicial review.[127]

The crux of the analytic difficulty is that determining whether a project will have a significant environmental impact is neither a purely legal nor a purely factual task. This initial administrative decision is not the kind of factfinding exercise requiring the judicial deference em-

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> an agency's decision whether to issue a negative declaration turns on its resolution of what resembles more a legal question than a factual one; the agency does not resolve conflicts in the evidence and conclude that there will or will not be significant environmental effects, but rather determines only whether there is substantial evidence supportive of a "fair argument" that such effects will occur.

Id. (citing Jensen v. Leonard, 82 Cal. App. 2d 340, 354, 186 P.2d 206, 215 (1947) (whether substantial evidence supports a finding is a question of law)).

The *Perley* court concluded that it "need not 'join' this conflict in decisional authority" because it found that plaintiff furnished no ground for rejecting the decision to prepare a negative declaration. *Id.* A decision later filed in the Fifth Appellate District cites *Friends of "B" St.* and *Brentwood* for the proper test for reviewing a negative declaration, ignoring *Pacific Water Conditioning*. Merz v. Monterey County Bd. of Supervisors, 147 Cal. App. 3d 933, 195 Cal. Rptr. 370 (1983) (finding it unnecessary to resolve the conflict); *see also* Dehne v. County of Santa Clara, 115 Cal. App. 3d 827, 845 n.7, 171 Cal. Rptr. 753, 763 n.7 (1981) (noting the split and observing that in *Friends of "B" St.*, the court held that a significant adverse change in the environment existed as a matter of law).

[126] 150 Cal. App. 3d 740, 198 Cal. Rptr. 100 (1984).

[127] The court's reasoning in upholding a negative declaration is somewhat obscure:

> [T]he trial court decided against plaintiffs, first applying the substantial evidence test to the county's determination that the project should be approved. Thereafter, the court applied the *Friends of "B" Street* standard as interpreted by plaintiffs, and independently found that there was "not adequate evidence to constitute a fair argument that significant environmental effects would result." The court should have determined whether there was substantial evidence to support the county's decision that the evidence presented to it was insufficient to support a fair argument that the dairy may have a significant environmental impact. However, since the court came to the same conclusion as did the county, it is rather obvious that the court determined that there was substantial evidence to support the county's decision that the evidence was insufficient to support a fair argument.

Id. at 748-49, 198 Cal. Rptr. at 104.

bodied by the substantial evidence standard, in which a court will affirm a finding of fact based on conflicting evidence. The agency's role is not to determine, based on the evidence before it, whether there *will* be a significant environmental impact, but whether there *may* be one. In other words, the agency must decide whether any doubt exists as to a question of fact, while a normal finding of fact resolves doubts rather than affirming them. Further, in making this determination, the court focuses on the evidence in the record pointing to a significant effect, not on evidence that there will not be such an effect. Once evidence of a possible significant effect reaches a point that it can be termed substantial, the agency's factfinding obligation is suspended and may only be completed later through the full EIR process.

At the same time, the agency is examining factual matters. It must have some discretion to conclude that, although there is evidence of significant effect, the evidence is qualitatively meaningless. The "fairly arguable" standard certainly requires the agency to resolve legitimate doubts about significance through the EIR process, but it does not require an impact report in every case in which any argument is made. The problem lies in determining how far the agency's discretion extends in disbelieving evidence or determining that the evidence is not "substantial" before the agency must stop its inquiry and submit the factual question to the EIR process. This question is not easily answerable. The trend of judicial decisions following the *Friends of "B" Street* standard suggests that courts will not accord agencies much leeway in "picking and choosing" among the evidence. By treating the issue as a legal one, the courts imply that public agency decisions in this area should be closely examined, perhaps because agencies are subject to political pressure to avoid the full EIR process. This scrutiny is, of course, a marked departure from the usual judicial deference to the actions of agencies.

The judicial attitude also suggests a common sense recognition of statutory purpose. The principal function of an EIR is simply to determine whether any significant environmental impacts will occur. If public agencies determine whether a significant impact will occur through the negative declaration process without benefit of an EIR, the legislative choice of method is plainly subverted. If that method is inefficient or inappropriate, it should be corrected through legislation rather than through agency manipulation of facts presented to it.

3. Legislative Resolution

The split in the courts of appeal apparently has been resolved with the passage of Assembly Bill 1462.[128] The bill declares that a negative declaration shall be prepared for a project when an initial study shows that there "is no substantial evidence . . . that the project may have a significant effect on the environment."[129] The *Friends of "B" Street* rule is adopted by implication; if there is any substantial evidence that the project may have a significant effect, Assembly Bill 1462 declares a negative declaration inappropriate. The bill also permits issuance of a negative declaration if a project is revised to avoid all significant effects before the negative declaration is released.[130]

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[128] Act of Sept. 13, 1983, ch. 771, 1983 Cal. Legis. Serv. 4239 (West) (codified at CAL. PUB. RES. CODE § 21080(c) (West Supp. 1984)).

[129] CAL. PUB. RES. CODE § 21080 (c) (West Supp. 1984). The bill declares that a negative declaration shall be prepared for a proposed project in either of the following circumstances:

> (1) There is no substantial evidence . . . that the project may have a significant effect on the environment. (2) An initial study identifies potentially significant effects on the environment but (i) revisions in the project plans or proposals made by or agreed to by the applicant before the proposed negative declaration is released for public review would avoid the effects or mitigate the effects to a point where clearly no significant effects would occur, and (ii) there is no substantial evidence before the agency that the project, as revised, may have a significant effect on the environment.

Id; see also Assembly Bill 2583, Act of Sept. 28, 1984, ch. 1514, § 6, 1984 Cal. Legis. Serv. 161, 165 (West) (significant effects determination must be based on substantial evidence in the record).

[130] *See id.* This part of the bill is intended to eliminate any question about the legality of what was formerly referred to as a "mitigated negative declaration." Project applicants often hope to avoid the expense and delay of preparing an EIR by changing their project to avoid the finding that it may have a significant environmental impact. *See, e.g.*, Letter from Larry Seeman, President, LSA, Inc. to Norman E. Hill, Assistant Secretary of Resources (Sept. 15, 1982) (suggesting that the State EIR Guidelines require the lead agency to cooperate with the applicant prior to receiving an application for a project "in order to facilitate review and maximize the opportunity of qualifying for a Negative Declaration rather than the more time-consuming and costly EIR"); Letter from Stephen C. Jones to Norman E. Hill, Assistant Secretary of Resources (Sept. 16, 1982) ("allowing an agency to negotiate with a project proponent early in the CEQA process is the most efficient, economical and environmentally sound mechanism for achieving the goals of CEQA. . . . [T]he public agency often is able to persuade an applicant to make changes in a project which might not have been made if an EIR were required . . . .") (both letters are part of the State EIR Guidelines rulemaking file; all letters referred to in footnotes are on file with the Secretary for Resources unless otherwise noted). While unobjectionable in concept, the idea of a "mitigated

C. Implications for Future Litigation

1. Consistency of Interpretation

The resolution of the dispute over the appropriate standard of judicial review will influence future CEQA litigation in several ways. First, the legislative adoption of the *Friends of "B" Street* rule retains the consistent theme in CEQA's development extending from the *Friends of Mammoth* decision: resolve all doubts in favor of applying the Act in the broadest manner. The rule conforms with the supreme court's admonition in *Friends of Mammoth* that courts should not countenance abuse of the "significant effect" language in the statute.[131]

The *Friends of "B" Street* case itself provides an example of the extent to which a strict application of the substantial evidence standard to threshold decisions would curtail the impact report process. The court catalogued the significant effects that would have resulted from the major street widening project, a proposal that would have profoundly affected the area surrounding the street and its residents.[132]

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negative declaration" gave rise to several practical difficulties. First, the "project" proposed was the development that an applicant filed for. Even if mitigation measures were later added by the public agency as conditions, it could still be argued the "project" remained the original proposal, and thus an EIR would still be needed because the project as initially proposed might have had a significant effect. *See* Letter from Michael H. Remy, Esq. and Tina A. Thomas, Esq. to Norman E. Hill, Assistant Secretary of Resources (Sept. 16, 1982) (noting that if a developer is allowed to amend a project by adding conditions throughout the hearing stage on a project, opponents would be unable to present evidence that potential significant impacts still existed and that an EIR was necessary).

The State EIR Guidelines include the concept of the "mitigated negative declaration" in § 15070, when the initial study identified potentially significant effects but:

> (1) Revisions in the project plans or proposals made by or agreed to by the applicant before the proposed negative declaration is released for public review would avoid the effects or mitigate the effects to a point where clearly no significant effects would occur, and
>
> (2) There is no substantial evidence before the agency that the project as revised may have a significant effect on the environment.

CAL. ADMIN. CODE tit. 14, § 15070 (1983). By requiring the revisions to be made *before* the initial study is released for public review, the Guidelines ensure that the public commenting process is not shortcircuited. A mitigated negative declaration was upheld in Perley v. Board of Supervisors, 137 Cal. App. 3d 424, 187 Cal. Rptr. 53 (1982). The court recognized that the point at which the project is "submitted for approval" must occur "sufficiently in advance of the final decision by the board to allow public comment on that issue." *Id.* at 431 n.3, 187 Cal. Rptr. at 57 n.3. This avoids incremental modifications of a proposal that preempt the public input function.

[131] 8 Cal. 3d at 272-73, 502 P.2d at 1065, 104 Cal. Rptr. at 777.

[132] The long-term effects of the project included increased traffic, increased noise,

Yet, under the *Pacific Water Conditioning* substantial evidence standard, concerns over those impacts would not be examined through the full CEQA process as long as conflicting evidence of no significant effect was introduced. Exempting projects with the range of impacts listed in *Friends of "B" Street* certainly is at odds with the premise of CEQA that the preparation of an EIR is necessary and useful.

2. Evidentiary Implications

Second, inconsistent factual determinations by local agencies and courts will continue under the *Friends of "B" Street* standard. A comparison of the factual situations in the recent decisions of *Newberry Springs Water Association v. County of San Bernardino*[133] and *Brentwood Association for No Drilling v. City Council*[134] is instructive in this regard. In *Brentwood*, the court found that substantial evidence existed in the administrative record and ordered preparation of an EIR for the drilling of a single exploratory core hole. This was done even though the permit was subject to twenty-seven operating conditions and the city had pointed to a long record of previous tests without environmental damage.[135]

By contrast, in *Newberry Springs* the court found that no EIR was necessary for the approval of a 900-cow dairy. The court examined the evidence concerning possible water pollution, odor, and fly problems. After observing that "common sense tells us that a 900-cow dairy will have an effect on the environment," the court "reluctantly" found that substantial evidence of a "fair argument" was not present in the record.[136] As a factual matter, it is difficult to see how the *Brentwood* project could require an EIR while the *Newberry Springs* dairy did not. This leads to the conclusion that appellate opinions based on whether a fair argument exists will provide little precedential guidance for later decisions made on different facts.[137]

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removal of 153 mature trees (some more than 80 years old), and an adverse effect on the residential desirability of adjacent properties because of increased noise and exposure to traffic. The court found that these effects, among others, "indicated that a finding of significant environmental effect was mandatory." 106 Cal. App. 3d at 1003, 165 Cal. Rptr. at 523-24.

[133] 150 Cal. App. 3d 740, 198 Cal. Rptr. 100 (1984).

[134] 134 Cal. App. 3d 491, 184 Cal. Rptr. 664 (1982).

[135] *Id.* at 496-97, 504-05, 184 Cal. Rptr. at 666-67, 671-72.

[136] 150 Cal. App. 3d at 748-49, 198 Cal. Rptr. at 104-05.

[137] The only exception would be when the projects at issue in two different cases were almost identical and were planned for almost the same location. This was the situation in *No Oil* and *Brentwood*. *See Brentwood*, 134 Cal. App. 3d at 495 n.4, 184

The adoption of the fair argument standard also signals that courts will carefully scrutinize the qualitative nature of the evidence in the administrative record to conduct a proper review. This, in turn, will greatly affect how potential plaintiffs must view the possibilities of CEQA litigation. The difference between cases such as *Brentwood* and *Newberry Springs* is the quality of the evidence before the administrative agency. In *Newberry Springs*, although the plaintiffs presented evidence on the question of significant effect, it was not the kind of concrete, factual evidence that would meet the fair argument standard. The plaintiffs in *Brentwood*, on the other hand, presented expert testimony on the possible significant effects of the core hole and exploratory drilling.[138]

The lesson is clear. Plaintiffs attempting to convince a court to overturn a decision not to require an EIR can no longer rely on their own, relatively unsubstantiated statements about what "might occur" as a result of the project. Presentations at the administrative agency level will require more expertise as documentation of possible impacts becomes critical. Of course, the evidence can be placed in the record by other sources, such as the staff of the public agency.[139] However, lay opinion, including the opinion of a planning commission that an EIR is needed,[140] is unlikely to convince a reviewing court.

It is possible that individuals challenging a negative declaration could

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Cal. Rptr. at 666 n.4.

[138] The court stated that "[g]iven such massive seismic and soil erosion consequences predicted by experts, although disputed by opposing experts, we must conclude . . . in such cases of factual controversy" that the uncertainty produced by conflicting assessments underscores the necessity of an EIR. *Id.* at 505, 184 Cal. Rptr. at 672.

[139] *See, e.g.*, Pistoresi v. City of Madera, 138 Cal. App. 3d 284, 188 Cal. Rptr. 136 (1982) (staff report contained substantial evidence indicating the project might have a significant effect).

[140] In Perley v. Board of Supervisors, 137 Cal. App. 3d 424, 429, 187 Cal. Rptr. 53, 55 (1982), the Planning Commission ordered preparation of an EIR because of the possibility of a significant environmental impact and the presence of serious public controversy. The court flatly rejected the argument that the disagreement between the Planning Commission and the Board indicated a "serious public controversy" and could affect whether the Board's decision not to prepare an EIR was legally correct: "If a planning commission decision to require an EIR cannot be reversed by the board of supervisors because to do so would establish as a matter of law the existence of serious public controversy, then the board . . . has ceded [its decisionmaking authority] to the planning commission." *Id.* at 436, 187 Cal. Rptr. at 60. Nonetheless, while a Planning Commission disagreement with the Board of Supervisors over the "significant effect" issue may have no legal bearing on the review of a negative declaration, it demonstrates the closeness of an issue, something that might favor potential plaintiffs as a practical matter.

present evidence of significant effect to the trial court outside the administrative record, and thereby compel preparation of an EIR. In *No Oil*, evidence was presented to the trial court challenging the adoption of the negative declaration, and the supreme court appeared to sanction this. The court commented that if the review were being conducted pursuant to traditional mandamus (that is, non-section 1094.5 review), the trial court is not limited to review of the administrative record.[141] In a recent decision, *Merz v. Board of Supervisors*, the court of appeal also recognized the possibility that outside evidence may be allowed, although it refused to decide whether additional evidence was proper in an attack on the approval of a project to reconstruct an intersection.[142]

Reliance on presenting outside evidence at trial is obviously risky for any party. Evidence should be placed into the record at the administrative agency level to ensure its examination by a reviewing court.[143]

3. Public Controversy

Finally, the emphasis upon whether a fair argument can be made from the evidence will result in continued judicial refinement of the definition of a public controversy concerning a project. Although this term has received significant attention throughout CEQA's history, it often has been misunderstood. The origin of its use was the California Supreme Court's statement in *No Oil* that "the existence of serious public controversy concerning the environmental effect of a project itself indicates that preparation of an EIR is desirable."[144] The court's lan-

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[141] 13 Cal. 3d at 79 n.6, 529 P.2d at 73 n.6, 118 Cal. Rptr. at 41 n.6 ("In an action for administrative mandamus, the court . . . receive[s] additional evidence only if that evidence was unavailable at the time of the administrative hearing, or improperly excluded from the record . . . . In a traditional mandamus action . . . the court . . . may receive additional evidence . . . .").

[142] 147 Cal. App. 3d 933, 937, 195 Cal. Rptr. 370, 373 (1983). The court held that it need not reach the issue because any error in receiving that evidence was not injurious to respondent.

[143] Plaintiff organizations that form after a decision has been made will likely find it more difficult to challenge the adoption of a negative declaration than if they were full participants at the earlier stages of the proceedings. *See* L. LAKE, ENVIRONMENTAL REGULATION: THE POLITICAL EFFECTS OF IMPLEMENTATION 73 (1982) (observing that protest groups often form "in the wake of the first public hearing called to receive comments on an environmental impact report.").

[144] The court in *No Oil*, 13 Cal. 3d at 85-86, 529 P.2d at 78, 118 Cal. Rptr. at 46, observed further that since one of the major purposes of an EIR is to inform the public of the environmental impacts of a proposed project and to demonstrate that the ecological implications have been in fact analyzed, a simple resolution or negative declaration stating that the project will have no significant effect cannot serve this function.

guage was quite precise; the controversy must be over the project's environmental effects, not the desirability of the project per se. The State EIR Guidelines echo this limitation on the role of public controversy in the EIR process.[145]

Nonetheless, the perception is that any kind of public controversy requires preparation of an EIR.[146] For this reason, the State Bar's CEQA Report recommended amending the statute to declare explicitly that public controversy shall not in and of itself constitute substantial evidence of a possible significant effect upon the environment.[147]

Recent case law should help dispel the impression that any presentation to an agency will constitute a public controversy requiring an EIR. For example, in *Perley v. County of Calavaras*,[148] the court explicitly endorsed a trial court's finding that mere fears and desires lacking any objective basis do not rise to the level of serious controversy. The

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[145] The Guidelines require that, in marginal cases, if there is serious public controversy over the environmental effects of a project, the lead agency shall consider the effect or effects to be significant and prepare an EIR. However, "[c]ontroversy unrelated to an environmental issue does not require preparation of an EIR." CAL. ADMIN. CODE tit. 14, § 15064(h)(1) (1983). The Guidelines in one respect do seem to indicate that the extent of public opinion may affect part of the determination. They state that in determining whether an effect is adverse or beneficial, the views of members of the public shall be considered. "If the lead agency expects that there will be a substantial body of opinion that considers or will consider the effect to be adverse" the agency shall regard it as adverse. *Id.* § 15064(c). Thus the *extent* of public opinion is to influence whether an impact is considered "adverse," but only the nature of that opinion is considered when it is determined whether the impact may be "significant."

[146] STATE BAR CEQA REPORT, *supra* note 14, at 52 ("some individuals believe that the existence of an environmental controversy in and of itself would require preparation of an EIR, even if there was no substantial evidence that the project might have a significant effect on the environment."); *see, e.g.*, Letter from David G. Hedberg, Planning Director, to Norman E. Hill, Assistant Secretary for Resources (Sept. 14, 1982) ("If there is a substantial body of public sentiment that feels a project will have a significant impact on the [physical] environment, I feel public agencies should be compelled to address their beliefs with an EIR.").

[147] STATE BAR CEQA REPORT, *supra* note 14, at 53. Assembly Bill 2583, enacted after this Article was completed, declares that the existence of public controversy over the environmental effects of a project shall not require preparation of an EIR "if there is no substantial evidence before the agency that the project may have a significant effect on the environment." Act of Sept. 28, 1984, ch. 1514, § 6, 1984 Cal. Legis. Serv. 161, 165 (West) (to be codified at CAL. PUB. RES. CODE § 21082.2). The State Bar Committee on the Environment drafted this legislation.

[148] 137 Cal. App. 3d at 436, 187 Cal. Rptr. at 61. The comments cited by plaintiff were general in nature and made no attempt to quantify the claimed impacts. *Id.* at 436 n.7, 187 Cal. Rptr. at 60 n.7.

Newberry Springs court reached a similar conclusion.[149] These decisions should help rebut assertions that mere opposition to a project establishes a public controversy requiring preparation of an EIR.

IV. The Legal Adequacy of the Environmental Impact Report

A. The Discussion of Environmental Impacts

In the public's view, CEQA litigation is perhaps best known for cases challenging the adequacy of information contained in an impact report. This type of suit alleges that the EIR omitted information essential to an informed review of the advisability of a proposed project.[150] The term "adequacy" as discussed here focuses on the sufficiency of data included in those categories of the impact report specified by statute. The emphasis is not on an inadequate definition of the project itself, a state of affairs that can prove equally troublesome in litigation.[151]

1. The Standard for Determining Adequacy

The State Guidelines define the standard for measuring the adequacy of an EIR as a sufficient degree of analysis that provides decisionmakers with information enabling them to evaluate environmental consequences intelligently.[152] The Guidelines continue:

> An evaluation of the environmental effects of a proposed project need not be exhaustive, but the sufficiency of an EIR is to be reviewed in light of

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[149] The court stated that the agency could reasonably determine that the evidence presented by plaintiffs did not create a controversy serious enough to make an EIR desirable. 150 Cal. App. 3d at 749, 198 Cal. Rptr. at 105.

[150] Goldman, *Legal Adequacy of Environmental Discussions in Environmental Impact Reports*, 3 UCLA J. Envtl. L. 1 (1983).

[151] In County of Inyo v. City of Los Angeles, 71 Cal. App. 3d 185, 139 Cal. Rptr. 396 (1977), the court invalidated the EIR prepared by the City of Los Angeles on its extraction of subsurface water from lands in Inyo County because the report was based on an erroneous definition of the proposed "project." The court noted that "[a]n accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR." *Id.* at 193, 139 Cal. Rptr. at 401; *see also id.* at 199, 139 Cal. Rptr. at 406. The city's EIR failed because it constantly shifted among different project descriptions. *Id.* at 197, 139 Cal. Rptr. at 404. Because the EIR did not properly define the project, the document also failed to "comply with CEQA's demand for meaningful alternatives." *Id.* at 203, 139 Cal. Rptr. at 408; *see also* County of Inyo v. City of Los Angeles, 124 Cal. App. 3d 1, 177 Cal. Rptr. 479 (1981) (finding that the city's project description continued to be inaccurate).

[152] Cal. Admin. Code tit. 14, § 15151 (1983).

> what is reasonably feasible. Disagreement among experts does not make an EIR inadequate, but the EIR should summarize the main points of disagreement among experts . . . .[153]

This standard parallels the language in cases delineating the standard to be applied in judging the adequacy of an EIR. The leading decision is *San Francisco Ecology Center v. City & County of San Francisco*,[154] a 1975 case in which plaintiffs challenged the approval of an expansion of San Francisco International Airport. In addition to the quoted statements regarding adequacy incorporated into the Guidelines, the court stated that "adequacy and completeness in an impact statement, not perfection" were important and stressed that the agency charged with preparation of the report is not prevented from making reasonable forecasts.[155] The *San Francisco* court directly borrowed these standards from applicable NEPA precedents.[156]

Because CEQA stresses the examination of alternatives that could reduce environmental damage,[157] the California courts have paid special attention to what constitutes a complete discussion of alternatives in an EIR. The analysis of alternatives "need not be exhaustive" and is analyzed under the often-cited "rule of reason." The information produced

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[153] *Id.*

[154] 48 Cal. App. 3d 584, 122 Cal. Rptr. 100 (1975).

[155] *Id.* at 594, 122 Cal. Rptr. at 106-07. An earlier case, Environmental Defense Fund, Inc. v. Coastside County Water Dist., 27 Cal. App. 3d 695, 104 Cal. Rptr. 197 (1972), had established that the court has a duty to pass on the sufficiency of an EIR as an informative document but not on the validity of its conclusions.

[156] Cases cited by the *San Francisco Ecology Center* court include Trout Unlimited v. Morton, 509 F.2d 1276, 1282 (9th Cir. 1974); Environmental Defense Fund, Inc. v. Corps of Eng'rs, 492 F.2d 1123, 1131 (5th Cir. 1974); National Helium Corp. v. Morton, 486 F.2d 995, 1002 (10th Cir.), *cert. denied*, 416 U.S. 993 (1973); Life of the Land v. Brinegar, 485 F.2d 460, 472 (9th Cir.), *cert. denied*, 416 U.S. 961 (1973); Scientists' Inst. for Pub. Information v. Atomic Energy Comm'n, 481 F.2d 1079, 1092 (D.C. Cir. 1973); Environmental Defense Fund, Inc. v. Corps of Eng'rs, 470 F.2d 289, 297 (8th Cir.), *cert. denied*, 412 U.S. 931 (1972); Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 836 (D.C. Cir. 1972); and Lathan v. Volpe, 350 F. Supp. 262, 265 (W.D. Wash.), *vacated on other grounds*, 506 F.2d 677 (2d Cir. 1972).

[157] CAL. PUB. RES. CODE § 21002.1 (West Supp. 1984) provides that the purpose of an EIR is to identify the significant environmental effects of a project, identify alternatives to the project, and indicate the manner in which such significant effects can be mitigated or avoided. Similarly, *id.* § 21002 declares that public agencies should not approve proposed projects if there are feasible alternatives or feasible mitigation measures that would substantially lessen the significant environmental effects, and that the CEQA procedures are intended to aid public agencies in identifying feasible alternatives.

must be sufficient to permit a reasonable choice between alternatives.[158]

2. The Standard Applied: A Soft Look

The standard is notable for its flexibility; it establishes no definitive rule about what must be included in the EIR.[159] This has led to claims that a plaintiff can always find a reason to attack an EIR and, concomitantly, that the preparer of an EIR cannot absolutely ensure the statement's legal sufficiency. The State Bar's CEQA Report recognizes a "fear by EIR preparers and decision-making bodies that any technical deficiency will result in overturning the decision made."[160] Others have suggested that it is impossible to predict whether an EIR will be upheld by the court on judicial review.[161]

Certainly the standard's vagueness makes a challenge to the adequacy of an EIR relatively simple to mount. For example, a plaintiff normally would encounter little difficulty framing a tenable assertion that an additional alternative to a project should have been discussed, or that the EIR examined a particular impact in too cursory a fashion. What is difficult, however, is undertaking that effort successfully. With two exceptions discussed below, the cases generally do not bear out the fear that any EIR can be successfully attacked on adequacy grounds. The trend of cases was obvious as early as 1977, causing one observer to comment with surprise that "adequacy challenges to EIRs are not dead" when a case sustaining a plaintiff's adequacy claim was handed down.[162]

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[158] *See* Village Laguna of Laguna Beach, Inc. v. Board of Supervisors, 134 Cal. App. 3d 1022, 1030, 185 Cal. Rptr. 41, 45 (1982); Foundation for San Francisco's Architectural Heritage v. City & County of San Francisco, 106 Cal. App. 3d 893, 910, 165 Cal. Rptr. 401, 410 (1980); Residents Ad Hoc Stadium Comm. v. Board of Trustees, 89 Cal. App. 3d 274, 286, 152 Cal. Rptr. 585, 593 (1979).

[159] Goldman, *supra* note 150, at 8.

[160] STATE BAR CEQA REPORT, *supra* note 14, at 44.

[161] Letter from Peter D. MacDonald, City Attorney of Pleasanton, to Assemblymember Terry Goggin (July 12, 1983) (copy on file with author). The writer states that the City of Pleasanton, in a recent CEQA case in which he was defending an EIR certification, raised the affirmative defense that CEQA is unconstitutional. The theory was that judicial review of CEQA determinations is arbitrary and capricious because the outcome turns not on the quality of the EIR, but "rather on whether the reviewing court chooses to promulgate some new interpretation of what CEQA requires which extends beyond accepted practice at the time the disputed EIR was prepared." *Id.*

[162] CAL. EIR MONITOR, July 8, 1977, at 11. In a discussion of the court of appeal's decision in County of Inyo v. City of Los Angeles, 71 Cal. App. 3d 185, 139 Cal. Rptr. 396 (1977), the editor noted that "the first point about this decision is that it shows that adequacy challenges to EIRs are not dead. A trend had appeared in recent decisions

An example will provide the general flavor of the judicial approach. In *Village Laguna of Laguna Beach, Inc. v. Board of Supervisors*,[163] petitioner alleged that an EIR was legally inadequate for failing to analyze all reasonable alternatives. The report discussed four alternatives to the applicant's 20,000 dwelling unit proposal: (1) the "no development" alternative (the present arrangement of four residences with the land used for cattle and barley); (2) the maintenance of the prior land use element of slightly over 10,000 dwelling units; (3) the "low density" alternative of 7500 dwelling units; and (4) a "high density" alternative of 25,000 dwelling units.[164] The petitioner contended that an additional alternative somewhere between the 10,000 and 20,000 figure should have been included, arguing with some plausibility that a figure between the currently existing plan and the applicant's proposal was an obvious alternative. Nonetheless, the court applied the "rule of reason" to dismiss this claim.[165] Other examples of unsuccessful EIR adequacy challenges include rejection of arguments that an EIR should have completed further testing on an archaeological site,[166] that a reduction

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showing that courts are increasingly reluctant to step into controversies over the contents of EIRs." CAL. EIR MONITOR, July 8, 1977, at 11. A similar conclusion was made by the editor in a comment to the decision in *Whitman v. Board of Supervisors* two years later. After recognizing that the decision demonstrates that courts will still invalidate EIR's on adequacy grounds, the editor observed: "Previously, a trend had appeared suggesting that courts were becoming less willing to rule EIRs inadequate. Plaintiffs were finding it increasingly difficult to invalidate an EIR based on objections to the adequacy of the document." CAL. EIR MONITOR, Apr. 25, 1979, at 5. The article then speculated that the trend "could be the result of increased skill on the part of EIR writers and of the increased reluctance of courts to substitute their judgment for the judgment of the administrative agency that was trying hard to comply with the law." *Id.*; *see also* Pridgeon, Anderson & Delphey, *supra* note 4, at 436 (During 1975-77 "the California courts seemed to show more deference to administrative discretion and efficiency in reviewing the adequacy of EIR's than in delimiting the scope of CEQA's exemptions.").

[163] 134 Cal. App. 3d 1022, 185 Cal. Rptr. 41 (1982).

[164] *Id.* at 1028-29, 185 Cal. Rptr. at 44.

[165] *Id.* at 1030, 185 Cal. Rptr. at 44. The court stated that there are literally thousands of "reasonable alternatives" to the proposed project, and that no one would argue the EIR is insufficient for failing to describe an alternative of 20,001 homes. The court also observed that, because there were no claims of deficiencies made with regard to the discussion of alternatives that were included in the EIR, "it must be assumed that decision makers and the public could make an informed comparison of the environmental effects of those various plans." *Id.* at 1029, 185 Cal. Rptr. at 44. The court thus seized on plaintiff's decision not to challenge the adequacy of the discussion of other alternatives as a basis for upholding the EIR's decision not to discuss any alternative between the existing plan and the 20,000-unit proposal.

[166] *See, e.g.*, Society for Cal. Archaeology v. County of Butte, 65 Cal. App. 3d 832,

in size of a shopping center should have been examined,[167] that further alternatives to a master plan should have been included,[168] and that an EIR "failed to deal with air pollution (acidity), light rail transit, ridesharing, alternative routes, flood control and maintenance of open space reserves."[169]

Although in the minority, some litigants have been successful in challenging the contents of EIR's. Courts have found EIR's inadequate for failing to discuss the impact of a development on school facilities,[170] for failing to provide sufficient information concerning the delivery of water needed by a mine,[171] and for basing the comparison of environmental impacts on the land uses allowed in the existing general plan rather than on the conditions of the existing environment.[172] Additionally, the difficulties experienced by the City of Los Angeles in preparing an adequate EIR for its Owens Valley water diversion projects are well documented.[173]

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135 Cal. Rptr. 679 (1977). The court observed: "In essence, this contention advocates a rule making it mandatory for an agency to conduct every test and perform all research, study and experimentation recommended to it to determine true and full environmental impact, before it can approve a proposed project. We reject this contention . . . ." *Id.* at 838, 135 Cal. Rptr. at 682.

[167] *See, e.g.*, City of Rancho Palos Verdes v. City Council of Rolling Hills, 59 Cal. App. 3d 869, 129 Cal. Rptr. 173 (1976).

[168] *See, e.g.*, City of Lomita v. City of Torrance, 148 Cal. App. 3d 1062, 196 Cal. Rptr. 538 (1983). For other cases rejecting challenges to the adequacy of EIR's, see Greenebaum v. City of Los Angeles, 153 Cal. App. 3d 391, 200 Cal. Rptr. 237 (1984); Foundation for San Francisco Architectural Heritage v. City & County of San Francisco, 106 Cal. App. 3d 893, 165 Cal. Rptr. 401 (1980); Karlson v. City of Camarillo, 100 Cal. App. 3d 789, 161 Cal. Rptr. 260 (1980); Residents Ad Hoc Stadium Comm. v. Board of Trustees, 89 Cal. App. 3d 274, 152 Cal. Rptr. 585 (1979); Lake County Energy Council v. County of Lake, 70 Cal. App. 3d 851, 139 Cal. Rptr. 176 (1977); San Francisco Ecology Center v. City & County of San Francisco, 48 Cal. App. 3d 584, 122 Cal. Rptr. 100 (1975); Concerned Citizens of Palm Desert, Inc. v. Board of Supervisors, 38 Cal. App. 3d 272, 113 Cal. Rptr. 338 (1974).

[169] Atherton v. Board of Supervisors, 146 Cal. App. 3d 346, 350, 194 Cal. Rptr. 203, 204 (1983) (parentheses in original).

[170] *E.g.*, El Dorado Union High School Dist. v. City of Placerville, 144 Cal. App. 3d 123, 132, 192 Cal. Rptr. 480, 485 (1983) ("The final EIR merely stated no mitigation measures were required. It contained no discussion of the impact of the project on [the] District and no mention of [the] District's opposition to the project.").

[171] *E.g.*, Santiago County Water Dist. v. County of Orange, 118 Cal. App. 3d 818, 173 Cal. Rptr. 602 (1981).

[172] *E.g.*, Environmental Planning & Information Council v. County of El Dorado, 131 Cal. App. 3d 350, 182 Cal. Rptr. 317 (1982).

[173] *See* County of Inyo v. City of Los Angeles, 124 Cal. App. 3d 1, 177 Cal. Rptr. 479 (1981); County of Inyo v. City of Los Angeles, 71 Cal. App. 3d 185, 139 Cal.

Some of these cases may be explained as involving special circumstances.[174] For the most part, cases raising CEQA adequacy claims do not bode well for plaintiffs. The courts generally have shown little inclination to weigh thoroughly the claims that the EIR is insufficient. Instead, the opinions often rely on general statements of the "reasonableness" of the public agency's efforts to find the discussion adequate.

Several reasons may account for plaintiffs' lack of success in this type of litigation. First, in most cases the court is examining an administrative record with the plaintiff receiving no opportunity to put on additional evidence.[175] Because the plaintiff is limited in what she can use to prove the case, the public agency may defend with greater ease any conclusions reached in the document. While comments submitted on the draft EIR may help illustrate the document's inadequacy,[176] plaintiffs must rely principally on the logic of argument.

A second and related reason is that courts are well aware of their inability to resolve conflicts over matters requiring technical expertise. If the plaintiff claims that a factual conclusion in the EIR is erroneous,

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Rptr. 396 (1977); County of Inyo v. Yorty, 32 Cal. App. 3d 795, 108 Cal. Rptr. 377 (1973).

[174] For example, one commentator has suggested that in *County of Inyo* the City of Los Angeles deliberately misconstrued the court's instructions regarding preparation of the EIR. Pridgeon, Anderson & Delphey, *supra* note 4, at 436. Similarly, the rather strange circumstances of Santiago County Water Dist. v. County of Orange, 118 Cal. App. 3d 818, 173 Cal. Rptr. 602 (1981), in which the parties engaged in a comedy of miscommunication, hardly seem typical. In this case, the EIR concluded that the District had indicated its ability to supply water for a mining operation when, in fact, it had not done so.

[175] *See supra* text accompanying notes 141-42.

[176] The County of Inyo fashioned its challenge to the adequacy of the City of Los Angeles' EIR in this manner in County of Inyo v. City of Los Angeles, 124 Cal. App. 3d 1, 177 Cal. Rptr. 479 (1981). The court noted that the county's claim that the project description was erroneous "was made the subject of a detailed comment by the county in response to the draft EIR." *Id.* at 10, 177 Cal. Rptr. at 484. The county's comment demonstrated in part the inadequacy of the city's project description. A challenge to adequacy based upon the content of a comment made to a draft EIR is, of course, closely related to the claim that the comment was not properly responded to by a public agency. *See infra* text accompanying notes 200-05. Parties must also exhaust their administrative remedies by presenting the claimed deficiencies to the public agency. *See, e.g.*, Sea & Sage Audubon Soc'y v. Planning Comm'n of Anaheim, 34 Cal. 3d 412, 668 P.2d 664, 194 Cal. Rptr. 357 (1983); San Bernardino Valley Audubon Soc'y v. County of San Bernardino, 155 Cal. App. 3d 734, 202 Cal. Rptr. 423 (1984); Coalition for Student Action v. City of Fullerton, 153 Cal. App. 3d 1194, 200 Cal. Rptr. 855 (1984); *CEQA and Exhaustion of Administrative Remedies*, CAL. EIR MONITOR, Aug. 3, 1984, at 4.

the court will often feel that the suit requires this type of resolution.[177] Third, an adequacy suit is brought after the entire EIR process has been completed, a situation sharply distinguishable from cases challenging the approval of negative declarations. A court will probably be much more comfortable ordering a public agency to further examine impacts by completing the full process established by CEQA — compiling an EIR — than it is questioning the result of that process.[178]

Finally, a plaintiff's presentation of the case may cause the court to

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[177] Argument lacking a firm factual foundation often proves too little. For example, in City of Lomita v. City of Torrance, 148 Cal. App. 3d 1062, 1069, 196 Cal Rptr. 538, 543 (1983), plaintiff alleged that the EIR was deficient because "it does not contain sufficient discussion of a number of topics required by CEQA" including consideration of alternatives to the master plan. Plaintiff cited as possible alternatives: Relocation of the airport to another area, acquiring additional property to reduce adverse airport effects, closing the airport on weekends, and closing the airport at certain times of the day. *Id.* at 1070 n.3, 196 Cal. Rptr. at 543 n.3. The court summarily rejected the argument, stating "we are told there were alternatives to the master plan which were not considered; we are not told how such alternatives were 'reasonable' or why they 'could feasibly attain the basic objectives of the project.' " *Id.* at 1069-70, 196 Cal. Rptr. at 543. Later in its opinion, while disposing of another argument, the court stated "it is enough to say the claim again is made without reference to evidence on the question in the record and is framed entirely in conclusionary terms." *Id.* at 1070, 196 Cal. Rptr. at 544.

The extent to which adequacy challenges turn on factual disputes was noted by Pridgeon, Anderson & Delphey, *supra* note 4, at 436. The authors observe that a possible answer to the decreased aggressiveness by California courts in reviewing the adequacy of EIR's is that "resolution of these issues inevitably depend[s] to a large extent on the circumstances of the case. As a result, the aggressive application of general rules is inhibited and the task of establishing general standards for measuring an EIR's adequacy is difficult." *Id.*

[178] The "terminal" aspect of a negative declaration seemed to concern the court in Plaggmier v. City of San Jose, 101 Cal. App. 3d 842, 161 Cal. Rptr. 886 (1980). In holding that the city did not comply with the requirement of direct mailing to owners of contiguous property when the last equalized assessment roll was used, the court commented that:

> The adoption of a negative declaration operates to dispense with the duty [under CEQA to disapprove an environmentally damaging project unless the alternatives or mitigation measures are not feasible] because it is a decision that the proposed project will not affect the environment at all. Its terminal effect on the environmental review process means that it is vitally important to the purpose of CEQA.

Id. at 853, 161 Cal. Rptr. at 892 (citation omitted). The court concluded that the opportunities to protest before that decision is made final are also important to the purpose of CEQA. *Id.* The aspects of the *Plaggmier* decision relating to the method of notice were later legislatively overturned in 1981 by Assembly Bill 2147. Act of July 19, 1981, ch. 232, 1981 Cal. Stat. 1235.

question the purpose of adequacy litigation. This seemed to be the situation in *City of Poway v. City of San Diego*,[179] a recent decision in which Poway opposed the approval of a development project contemplating 5290 dwelling units with a population of 12,000 people. On the day the City Council of San Diego was to consider the project, Poway submitted a letter with an attachment containing fifty-three separate objections to the project.[180] Poway later challenged the approval of the project on a wide variety of CEQA bases, including failure to respond to its comments, inadequacy of the EIR, and failure to make proper findings.[181] The court's opinion indicates dissatisfaction with the Poway approach, terming it at one point a "blunderbuss" and pointing out that "delay is a tactic in environmental disputes to force developers to accede to project design changes simply because of the economic pressure to move a development forward."[182] If a court adopts this attitude toward a plaintiff, it surely will not view numerous adequacy challenges with the degree of seriousness that a more narrowly tailored lawsuit would require.

As noted above, however, the courts have proved more willing to scrutinize the content of the final document in two situations: when the sufficiency of the responses to comments or the analysis of cumulative impacts is at issue. The courts' concern with the former is explained by the decided emphasis placed on the role of public participation in the CEQA process. Public involvement has become a central purpose of CEQA, largely through judicial decisions.[183] The cases on cumulative impacts, on the other hand, resemble the typical adequacy case. Accordingly, a closer examination is necessary to determine why courts have stressed this aspect of CEQA.

3. The Exception: Cumulative Impacts

The cumulative impacts requirement has a statutory origin. Public Resources Code section 21083 requires a finding that a project may have a significant effect on the environment if the possible effects of a project are individually limited but cumulatively considerable.[184] The

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[179] 155 Cal. App. 3d 1037, 202 Cal. Rptr. 366 (1984).

[180] *Id.* at 1043, 202 Cal. Rptr. at 370.

[181] *Id.* at 1043-46, 202 Cal. Rptr. at 370-73.

[182] *Id.* at 1044, 1047, 202 Cal. Rptr. at 370, 373. The court stated, "We think the dumping of 53 challenges on the day of the hearing without explanation as to the obvious delay is unconscionable." *Id.* at 1044, 202 Cal. Rptr. at 370.

[183] *See infra* text accompanying notes 198-203.

[184] CAL. PUB. RES. CODE § 21083 (West Supp. 1984).

statute defines the term "cumulatively considerable" to mean that: "[T]he incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects."[185]

Although litigation over cumulative impacts has not been extensive, the courts of appeal have issued two opinions strongly enforcing the requirement that an EIR must consider cumulative impacts. In *Whitman v. Board of Supervisors*,[186] plaintiff challenged the approval of a conditional use permit to drill an exploratory oil and gas well. An EIR had been prepared on the proposal, but it contained only a paragraph discussing cumulative impacts. This passage merely stated that the cumulative impacts of this project and two others in the area "include increased traffic on State Route 150 and a minor increase in air emissions."[187]

The *Whitman* court, focusing closely on the factual setting, found the discussion totally inadequate. Noting that the then-existing State EIR Guidelines required specific reference in the EIR to related public and private projects in the region, both existing and planned, the court concluded that "[t]he inadequacy of the cumulative impact discussion in the EIR . . . is manifest."[188] The opinion referred to a map disclosing a large number of operational oil wells in the immediate area.[189] While the court recognized its limited review of an EIR and declared that

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[185] *Id.* Detailed standards for the discussion of cumulative effects are set out in § 15130 of the State EIR Guidelines. The Guidelines provide that cumulative impacts shall be discussed when they are significant and the discussion shall reflect the severity of the impacts and their likelihood of occurrence. CAL. ADMIN. CODE tit. 14, § 15130(a), (b) (1983). The discussion of cumulative impacts need not be as detailed as the analysis of effects attributable to the project itself. *Id.* A detailed list of the elements necessary for an adequate discussion of cumulative impacts is set forth, including a list of projects producing related or cumulative impacts, a summary of the expected environmental effects, and an analysis of the cumulative impacts of related projects. *Id.* § 15130(b).

[186] 88 Cal. App. 3d 397, 151 Cal. Rptr. 866 (1979).

[187] *Id.* at 406, 151 Cal. Rptr. at 870.

[188] *Id.* at 409, 151 Cal. Rptr. at 872.

[189] The court pointed to several documents in the administrative record that demonstrated the extent of the cumulative impacts: (1) a map prepared by the State Division of Oil and Gas contained in the draft EIR that indicated a large number of operational oil wells in the area of the project under review; (2) pleadings prepared by the respondent and real party in interest admitting that the area "has substantial oil operations already there" and that other drilling operations go on regularly; and (3) a declaration attached to the response of the respondent and real party in interest declaring that 80 wells had been drilled within a one mile radius of the site. *Id.* at 409 n.5, 151 Cal. Rptr. at 873 n.5.

perfection is not required, it found the EIR lacked "even a minimal degree of specificity or detail" and was "utterly devoid of any reasoned analysis" of the type required.[190] The *Whitman* standards for determining cumulative impacts later were incorporated into the CEQA Guidelines.[191]

In *San Franciscans for Reasonable Growth v. City & County of San Francisco*,[192] the First District Court of Appeal used those standards to find that four EIR's prepared for high-rise developments in San Francisco were inadequate because they failed to adequately discuss the cumulative impact of other large-scale developments.[193] The petitioners had submitted comments challenging the figures used in the draft EIR for discussion of cumulative impacts. Thereafter, the city approved final EIR's using one set of numbers for calculating the cumulative impacts. At the same time, however, those final EIR's acknowledged the existence of much larger figures of cumulative, related projects. The court found that this "disparity between what was considered and what was known is the basis upon which we find an abuse of discretion."[194] As with *Whitman*, the court reached its conclusion after acknowledging the limited scope of judicial review regarding the adequacy of an EIR.

Both of these cases indicate increased judicial willingness to delve into the factual details of an EIR to determine its adequacy with respect to cumulative analysis of environmental impacts than in other, typical adequacy cases. One possible explanation for this willingness is the relative ease with which petitioners demonstrated the inadequacy of the cumulative impacts discussion. In *Whitman*, for example, the petitioner pointed to documents contained in the administrative record that conclusively demonstrated the extent of other drilling activities in the area. The court also took judicial notice of modifications in the conditional use permit allowing drilling of additional wells, apparently finding that fact significant.[195]

The *San Franciscans for Reasonable Growth* court premised its decision that the analysis of cumulative effects was insufficient on language in the EIR that was influenced by petitioners' presentation to the administrative agency. In response to that presentation, the EIR in essence had included two sets of cumulative impact figures. The city used

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[190] *Id.* at 411, 151 Cal. Rptr. at 874.

[191] *See* CAL. ADMIN. CODE tit. 14, § 15130 (1983).

[192] 151 Cal. App. 3d 61, 198 Cal. Rptr. 634 (1984).

[193] *Id.* at 74, 198 Cal. Rptr. at 640.

[194] *Id.* at 77, 198 Cal. Rptr. at 642.

[195] 88 Cal. App. 3d at 410 n.6, 151 Cal. Rptr. at 873 n.6; *see also supra* note 189.

one set to identify the cumulative impacts on traffic and municipal services, while the second set of larger figures was not used. In calculating the cumulative impacts, the court simply used the larger numbers to conclude that the cumulative impact analysis on such items as traffic and municipal transportation was inadequate.[196]

Technical judgments on the court's part were unnecessary in both cases; addition or a comparison of figures was all that was required. In many adequacy cases, on the other hand, the plaintiff is asking the court to apply scientific or other technical expertise to conclude an EIR is inadequate, something the courts are uncomfortable with.

An additional reason for the courts' willingness to examine cumulative impacts may exist. One of the most important environmental lessons evident from past experience is that environmental damage often occurs incrementally from a variety of small sources. These sources appear insignificant, assuming threatening dimensions only when considered in light of the other sources with which they interact. Perhaps the best example is air pollution, where thousands of relatively small sources of pollution cause a serious environmental health problem.

CEQA has responded to this problem of incremental environmental degradation by requiring analysis of cumulative impacts. Because of the critical nature of this concern, courts have been receptive to claims that environmental documents paid insufficient attention to cumulative impacts. For example, in *San Franciscans for Reasonable Growth*, the court stated that absent meaningful cumulative analysis, there would never be any awareness or control over the speed and manner of downtown development. Without that control, "piecemeal development would inevitably cause havoc in virtually every aspect of the urban environment."[197]

This judicial concern often is reinforced by the results of cumulative environmental analysis; the outcome may appear startling once the nature of the cumulative impact problem has been grasped. In *San Franciscans for Reasonable Growth*, the court was impressed by the changes in severity of environmental impact suggested by use of the alternative set of figures in conducting that analysis. The court observed that the city's methodology left out nearly sixty percent of the

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[196] The court bolstered its conclusion about the "severity and significance" of the environmental impacts, *see* CAL. ADMIN. CODE tit. 14, § 15023.5(c) (1983), by asking the question: "What would the Sansome Project EIR's analysis have concluded regarding the impacts on Muni had it considered 16.2 rather than 6.3 million square feet of development?" 151 Cal. App. 3d at 79, 198 Cal. Rptr. at 643.

[197] 151 Cal. App. 3d at 77, 198 Cal. Rptr. at 642.

total amount of related development. The court found that an omission of this type "inevitably renders an analysis of cumulative impacts inaccurate and inadequate because the severity and significance of the impacts will, perforce, be gravely understated."[198]

In addition to closely examining the discussion of "cumulative impacts," the courts have also issued emphatic opinions finding EIR's inadequate in one other area: responses to comments submitted by the public and by agencies. However, these decisions cannot be viewed as adequacy cases in the usual sense, since they relate to what the courts perceive as a principal, if not the primary, purpose of CEQA.

B. The Role of Public Participation

1. The Public Review Procedure

One of the strongest themes running through the body of CEQA case law is the beneficial effect of public participation on the environmental review process. The State EIR Guidelines detail the steps for circulating negative declarations and draft EIR's to the public and governmental agencies for their comments.[199] The purposes of public review are declared to be sharing expertise, disclosing agency analyses, checking for accuracy, detecting omissions, discovering public concerns, and soliciting counterproposals.[200] The Guidelines also advise that each public agency "should include provisions in its CEQA procedures for wide public involvement" in order to receive and evaluate public reactions.[201]

The mechanics of the prescribed public review procedures are described specifically. Notice of the availability of a negative declaration or draft EIR must be given to organizations and individuals who have requested it.[202] Most importantly, the lead agency must evaluate com-

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[198] *Id.* at 79, 198 Cal. Rptr. at 643.

[199] *See* CAL. ADMIN. CODE tit. 14, § 15073 (1983) ("Public Review of a Negative Declaration"; the lead agency shall provide a sufficient public review period for a proposed negative declaration); *Id.* § 15083 ("Early Public Consultation"; provides that prior to completing a draft EIR, the lead agency may also consult directly with any person or organization it believes will be concerned with project's environmental impacts); *Id.* § 15087 (lead agency shall provide public notice of draft EIR's availability and shall provide for public review for a period not less than 30 days; the section further encourages holding of public hearings). Additional public participation requirements are found in *id.* §§ 15200-15210.

[200] *See* CAL. ADMIN. CODE tit. 14, § 15200 (1983).

[201] *Id.* § 15201.

[202] *Id.* §§ 15072, 15087.

ments on environmental issues received from the public or governmental agencies and prepare a written response. The response should describe the disposition of issues raised, for example, revising the project to eliminate environmental impacts. If this is not done, the agency must give "reasons why specific comments and suggestions were not accepted."[203] Good faith and reasoned analysis are required; responses that are "[c]onclusory statements unsupported by factual information" are insufficient.[204]

The breadth of these public review requirements attest to the validity of the comment by the preparers of the Guidelines that "[p]ublic participation is an essential part of the CEQA process."[205] This position also is fully supported by case law; the State EIR Guidelines merely echo numerous judicial statements about the importance of public participation. On the basis of these statements, the courts have overturned decisions based on EIR's that did not respond fairly to both public and agency comments.

2. The "Response to Comment" Cases

Although it concerned responses to comments by state agencies rather than by private citizens, the 1981 court of appeal decision in *Cleary v. County of Stanislaus*[206] typifies the judicial approach to the response to comment cases. Petitioners alleged that an EIR was defective because it failed to address comments received from three state agencies. After summarizing previous case law and the requirements of the State EIR Guidelines, the court closely examined both the agencies' comments and the responses by the county, concluding that the county responded insufficiently to two of the three sets of comments.

The State Department of Agriculture had pointed out that the site proposed for residential development was surrounded by prime agricultural land and that the EIR did not address the effect on these sur-

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[203] *Id.* § 15088 (a), (b). The commentary on the section states that its main purpose is to codify the holding in People v. County of Kern, 39 Cal. App. 3d 830, 115 Cal. Rptr. 67 (1974). Section 15088 also provides that the response to comments may take the form of a revision to the draft EIR or may be a separate section of the final EIR. When there are important changes made in the text of the draft, the agency may either (1) revise the text in the body of the EIR, or (2) include marginal notes showing that the information is revised in the response to comments. CAL. ADMIN. CODE tit. 14, § 15088(c) (1983).

[204] CAL. ADMIN. CODE tit. 14, § 15088(b) (1983).

[205] *Id.* § 15202. The guidelines also provide that each public agency should include procedures for wide public involvement.

[206] 118 Cal. App. 3d 348, 173 Cal. Rptr. 390 (1981).

rounding lands. The court found the county's response to this comment inadequate for failing to include the "specific factual information suggested by the Department."[207] Similarly, the court condemned the county's response to comments by the State Air Resources Board that the analysis of air quality impact was nonexistent and that the potential effect on air quality unknown.[208] The county's response was two-fold: the county's environmental review committee had not viewed this as a concern and, on a regional basis, the increase in traffic was insignificant. The court found that response inadequate, terming it "nonspecific and general."[209]

Courts have exhibited more flexibility when evaluating the agency's method of response in contrast to evaluating its content. For example, they have refused to overturn an EIR for failure to respond to an issue raised in a comment if a response to that issue could be gleaned from other material in the EIR.[210] Additionally, to prevail a plaintiff will

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[207] *Id.* at 359, 173 Cal. Rptr. at 396. "The Board's response was simply '[t]he Department of Food and Agriculture is concerned with the effect on agriculture in the area. This concern has been addressed in previous responses.' " *Id.* The Department's letter had noted the lack of detailed information concerning the extent and nature of surrounding lands, and the effect of the proposed development on other landowners in the area. *Id.* at 358, 173 Cal. Rptr. at 395. The court found that, while the draft EIR did address in general terms the effect of irreversibly committing the project property to commercial use, the specific information by the county "could be an exceedingly important consideration in approving or disapproving the project." *Id.* at 359, 173 Cal. Rptr. at 396.

[208] *Id.* at 357, 173 Cal. Rptr. at 395.

[209] *Id.* at 358, 173 Cal. Rptr. at 395.

[210] *See* Twain Harte Homeowners Ass'n v. County of Tuolumne, 138 Cal. App. 3d 664, 685, 188 Cal. Rptr. 233, 244-45 (1982). Appellant contended that the responses to comments it had made regarding resource protection were inadequate. The court found that the responses in fact did "not fully respond to appellant's remarks in connection with the impact of the decision system upon the timber, mining and agricultural industries within the County." *Id.* at 684, 188 Cal. Rptr. at 244. However, the court ruled that the "response to similar concerns" expressed in another letter were "sufficient to rectify this inadequacy." *Id.*

The *Twain Harte* case seems to take a slightly less rigorous approach in requiring responses than other cases. The court found that the responses as a whole "evince good faith and a reasoned analysis" even though the court admitted that they were not exhaustive or thorough in some respects. *Id.* at 686, 188 Cal. Rptr. at 246. In doing so, the court cited the general standard for adequacy of an EIR: "[t]he evaluation of environmental effects of the proposed project need not be exhaustive. The sufficiency of the EIR is to be viewed in light of what is reasonably feasible. Courts should look for adequacy and completeness in an EIR, not perfection." *Id.* at 686, 188 Cal. Rptr. at 245. *But see* People v. County of Kern, 39 Cal. App. 3d 830, 841, 115 Cal. Rptr. 67, 71 (1974) ("the County must describe the disposition of each of the significant environ-

have to demonstrate the alleged failure with specificity.[211] The courts, however, have jealously guarded the public's right to review all pertinent environmental information. An agency must recirculate an impact report if, in response to a public comment, the agency has included significant new information in the EIR.[212]

The most striking feature of this case law is that the policies it embraces are primarily of judicial origin. The cases evidence an evolution of purpose that has occurred over the fourteen years of CEQA's existence. While CEQA initially was viewed solely as an environmental protection mechanism, courts now assert that one of its purposes is to safeguard democratic participation in government decisionmaking.

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mental issues raised and must particularly set forth in detail the reasons why the particular comments and objections were rejected").

[211] In City of Lomita v. City of Torrance, 148 Cal. App. 3d 1062, 196 Cal. Rptr. 538 (1983), the court cited *In re* Marriage of Fink, 25 Cal. 3d 877, 887-88, 603 P.2d 881, 886, 160 Cal. Rptr. 516, 521 (1979), for the proposition that an appellant must state fully, with transcript references, the evidence that is claimed to be insufficient to support the findings:

> We are told mitigation measures relative to the master plan were not properly identified nor adequately analyzed; we are not told in what fashion or to what extent this is true, nor is any specific reference made to what *was* included on this point so as to demonstrate its inadequacy.

148 Cal. App. 3d at 1070, 196 Cal. Rptr. at 543 (emphasis in original); *see also* Cleary v. County of Stanislaus, 118 Cal. App. 3d 348, 360, 173 Cal. Rptr. 390, 396 (1981) ("This court is not required to search the record for error."). While this legal proposition is generally applied to an appeal from a lower court trial, the *City of Lomita* court proceeded to apply its principles to a CEQA case in which the court of appeal, like the trial court, is reviewing an administrative record.

[212] *See* Sutter Sensible Planning, Inc. v. Board of Supervisors, 122 Cal. App. 3d 813, 176 Cal. Rptr. 342 (1981). In *Sutter*, after a draft EIR had been circulated, the Board returned it to the Planning Department for redrafting. However, although the revised final EIR contained new information, it was made available to the public only 12 days before the board meeting at which it was finally approved. Nothing in the record indicated that it had been circulated to responsible public agencies. *Id.* at 821, 176 Cal. Rptr. at 346. The court, citing federal precedents, held that "recirculation is not required where the supplement merely clarifies, amplifies or makes insignificant modifications." *Id.* at 822-23, 176 Cal. Rptr. at 347 (citation omitted). However, the document must be recirculated when "substantial changes" are made. The court found recirculation necessary under the facts of this case, commenting that even though there would be delay, "we may not permit such considerations to eviscerate the fundamental requirement of public and agency review that is the strongest assurance of the adequacy of the EIR." *Id.* at 823, 176 Cal. Rptr. at 348; *see also* Stevens v. City of Glendale, 125 Cal. App. 3d 986, 999, 178 Cal. Rptr. 367, 374 (1981) (commenting on trial court's order that the public must receive notice of revisions to a draft EIR so that "interested parties will have the opportunity to review and comment" on it).

3. Public Review as a Method for Improved Decisionmaking

The Act itself contains little legislative recognition of the benefits of public or agency participation. As originally enacted, CEQA specified that the purpose of an EIR is to provide public agencies with detailed information about the project's environmental effects to help minimize those effects.[213] Although stating that "[e]very citizen has a responsibility to contribute to the preservation and enhancement of the environment,"[214] the Act has never required an agency to hold a public hearing before approving an environmental document.[215] No method for public input is explicitly established in the Act.

The originally proposed State EIR Guidelines did not emphasize public participation, containing no requirement that environmental documents circulate for public review. Only after the State Attorney General and various environmental organizations criticized the Guidelines were they revised to provide for this input.[216] By 1974, the Guidelines declared that the lead agency "should provide adequate time for other public agencies and members of the public to review and comment on an EIR that it has prepared," and that the final EIR must contain the agency's response to significant environmental issues raised.[217]

At this point in CEQA's development, the courts began to recognize the public participation purposes that they found implicit in the Act. In an early case, *Environmental Defense Fund, Inc. v. Coastside County Water District*,[218] the appellate court determined that a function of the

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[213] CAL. PUB. RES. CODE § 21061 (West 1977) states in part that "[t]he purpose of an environmental impact report is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects . . . might be minimized; and to indicate alternatives . . . ."

[214] *Id.* § 21000(e) (West 1977 & Supp. 1984).

[215] *See* Lightweight Processing Co. v. County of Ventura, 133 Cal. App. 3d 1042, 1047, 184 Cal. Rptr. 479, 482 (1982) ("There is no provision in the CEQA itself which specifically requires a public hearing in connection with the preparation and filing of an EIR."); Concerned Citizens of Palm Desert, Inc. v. Riverside County Bd. of Supervisors, 38 Cal. App. 3d 272, 284, 113 Cal. Rptr. 338, 346 (1974) ("CEQA does not require public hearings in the environmental review procedure.").

[216] *See* T. TRYZNA & A. JOKELA, *supra* note 11, at 41 (Attorney General's criticism was that "the guidelines proposed fail to provide any means by which the public can effectively provide input.").

[217] CAL. ADMIN. CODE tit. 14, § 15160 (repealed 1983).

[218] 27 Cal. App. 3d 695, 705, 104 Cal. Rptr. 197, 202 (1972) ("But the EIR has another function: the informing of the executive and legislative branches of government, state and local, and of the general public of the effect of the project on . . . 'The

EIR was to inform the branches of government and the public of the environmental effects of a project. Two years later, CEQA was characterized as having a "policy of citizen input which underlies the Act."[219]

The main purpose of public input was identified as its influence on the final EIR and thus on the ultimate decision by the public agency. For example, in *Sutter Sensible Planning, Inc. v. Board of Supervisors*[220] the court took note of the delay that would occur if it ordered the approvals vacated. However, the court nonetheless voided them, refusing to allow the delay "to eviscerate the fundamental requirement of public and agency review that is the strongest assurance of the adequacy of the EIR."[221] In another case, *People v. County of Kern*,[222] the court cited a NEPA case to conclude that the EIR "helps insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug."

The commenting process was seen in these cases as a mechanism for ensuring that the ultimate decision on whether to approve a project was made on a more reasoned basis. This view was echoed in *Russian Hill Improvement Association v. Board of Permit Appeals*,[223] in which the court found that "disclosure of the EIR prior to the administrative decision to permit input from both the public and other agencies into both the making of the report and the governmental decision based on that report" was one of the basic CEQA requirements. The court concluded that information revealed by the commenting process is an important consideration in approving or disapproving the project.[224]

The furthest judicial extension of the view that citizen input can lead to improved decisionmaking was the supreme court's decision in *Woodland Hills Residents Association v. City Council of the City of Los Angeles*.[225] The court overturned a subdivision approval because the city had not affirmatively solicited the views of the neighboring homeowners prior to completing the draft EIR. Relying in part on a Guideline section that encouraged but did not mandate early consultation, the

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Environment.' ").

[219] People v. County of Kern, 39 Cal. App. 3d 830, 841, 115 Cal. Rptr. 67, 75 (1974). This case is still considered the leading authority on an agency's duty to respond.

[220] 122 Cal. App. 3d 813, 823, 176 Cal. Rptr. 342, 348 (1981).

[221] *Id.*

[222] 39 Cal. App. 3d at 841, 115 Cal. Rptr. at 75 (citing Silva v. Lynn, 482 F.2d 1282, 1285 (1st Cir. 1973)).

[223] 44 Cal. App. 3d 158, 167, 118 Cal. Rptr. 490, 496 (1974).

[224] *Id.* at 171, 118 Cal. Rptr. at 498.

[225] 26 Cal. 3d 938, 609 P.2d 1029, 164 Cal. Rptr. 255 (1980).

court reasoned that if differing views were not gathered prior to the draft's preparation, preparers would be less able to accept conflicting views. As a result, those views would not be weighed with the same objective balance and thus, by implication, the decision would not be as finely tuned.[226]

This view of the public participation requirement owes much to reforms in administrative law encouraged by the federal courts in the 1970's.[227] During this decade, a consensus emerged that if public participation could be increased in agency rulemaking proceedings and adjudicatory hearings, administrative agency decisionmaking would be improved. As one commentator summarized, "[t]he primary reason that public participation [in rulemaking] leads to better rules is that it provides a channel through which the agency can receive needed education."[228] Additionally, public input was viewed as helping to offset in-

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[226] *Id.* at 950, 609 P.2d at 1035, 164 Cal. Rptr. at 262.

[227] For a discussion of these reforms, see generally Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975).

[228] Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 520, 574 (1977). Asimow continues: "Agencies are not omniscient and do not have all relevant economic and social data. They cannot anticipate all of the consequences and problems that will flow from the adoption of their rules. This sort of data is obtained by requiring the agency to solicit and consider public comments . . . ." *Id.*; *see also* Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 359 (1972):

> It is not surprising, then, that in a time when government agencies are challenged as being unresponsive to public needs and to the public interest, one "solution" frequently suggested is to broaden citizen involvement and participation in administrative decision making. Reflecting this concern, courts more frequently require agencies "to cut the squarest of procedural corners," ruling, for example, that all interested persons must be allowed an "unrestricted" opportunity to be heard.

Gellhorn notes that the advantages of public participation in administrative hearings include: Providing agencies with another dimension useful in assuring responsive and responsible decisions; serving as a safety valve allowing interested persons and groups to express their views; easing the enforcement of administrative programs relying upon public cooperation; and satisfying judicial demands that agencies observe the highest procedural standards. *Id.* at 361; *see also* Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525 (1972); Ogden, *Analysis of Three Current Trends in Administrative Law: Reducing Administrative Delay, Expanding Public Participation, and Increasing Agency Accountability*, 7 PEPPERDINE L. REV. 553, 564 (1980) ("It is generally recognized that expanded public participation in regulatory agency proceedings would produce a number of beneficial results . . . includ[ing] well-balanced administrative decisions, representation of currently unrepresented interests, and increased public acceptance of, and confidence in, administrative decisions.").

stitutional biases.[229] Thus, the California courts' encouragement of citizen and public agency participation in CEQA merely recognized the same concerns apparent in the development of administrative law generally during this period.

4. Public Participation as a Democratic Ideal

At the same time, however, the courts considering CEQA issues enunciated a related but somewhat different justification for the public review requirements. This was a concern over the democratic rather than purely environmental goals of the decisionmaking process. Courts found that greater public access to decisionmaking procedures promotes democratic goals by allowing the public increased insight into the environmental values held by elected public officials. If citizens disagree with those values, the courts have pointedly suggested that this disagreement can and should influence the political process. The dual purpose of the public review process — its effect on the decision made as well as its democratizing function — was articulated by the court of appeal in *Karlson v. City of Camarillo*:[230]

> In reviewing an EIR a paramount consideration is the right of the public to be informed in such a way that it can intelligently weigh the environmental consequences of any contemplated action and have an appropriate voice in the formulation of any decision. But the following principles must also be considered. The EIR is not an action document. Its purpose is to inform governmental decision makers *and* to focus the political process upon their action affecting the environment . . . .

Perhaps the earliest allusion to a democratic justification is found in the California Supreme Court's *No Oil* opinion. In *No Oil* the court observed that a major purpose of the EIR is "to demonstrate to an apprehensive citizenry" that the agency in fact has analyzed and considered the implications of its decision.[231] The purpose for this demonstration was explained in *Sutter Sensible Planning, Inc. v. Board of Supervisors*.[232] The appellate court held that including information in an EIR "without being subject to the critical evaluation that occurs in the draft stage" through public review "denied the plaintiffs the 'opportunity to test, assess, and evaluate the data and make an informed judg-

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[229] *See* Asimow, *supra* note 228, at 574.

[230] Karlson v. City of Camarillo, 100 Cal. App. 3d 789, 804, 161 Cal. Rptr. 260, 269 (1980) (emphasis added).

[231] No Oil, Inc. v. City of Los Angeles, 13 Cal. 3d 68, 86, 529 P.2d 66, 78, 118 Cal. Rptr. 34, 46 (1974).

[232] 122 Cal. App. 3d 813, 176 Cal. Rptr. 342 (1981).

ment as to the validity of the conclusions to be drawn therefrom.' "[233] One function of this information-gathering mechanism, then, is to promote a type of "second-guessing" process by which citizens reach their own conclusions about environmental impacts.

The courts also have articulated a view of how this information may be used by the public should the ultimate decision result in damage to the environment. In *City of Rancho Palos Verdes v. City Council of Rolling Hills Estates*,[234] the court concluded that the EIR should describe alternatives in sufficient detail to inform the public, "which will respond to the action through the political process." This theme was also noted in *People v. County of Kern*,[235] in which the court observed that only by carrying out the CEQA process "will the public be able to determine the environmental and economic values of their elected and appointed officials, thus allowing for appropriate action come election day should a majority of the voters disagree."

In sum, the courts view the EIR as both a tool to improve decisions and as an adjunct of the political process. Both strands of reasoning combine to account for the strong role the courts have taken in ensuring that governmental agencies fully respond to public comments on draft EIR's.

5. The Usefulness of the Public Commenting Function

Because of the emphasis given to the commenting process, it is appropriate to examine the effectiveness of that process. Any analysis of the commenting function must consider comments submitted by the public separately from those of governmental agencies. Because the comments from these two groups serve different purposes, the examination may lead to different conclusions regarding their efficacy.

In practice, comments by members of the public appear to have had mixed reviews. In some instances, comments have been used to pinpoint serious environmental consequences that the agency may not have wanted to emphasize. For example, in *Twain Harte Homeowners Association, Inc. v. County of Tuolumne*,[236] the responses to comments disclosed that the county Board of Supervisors had chosen to make the initial general plan designation of property as urban or nonurban depend on the availability of water and sewage facilities. This was a sig-

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[233] *Id.* at 822, 176 Cal. Rptr. at 347 (quoting Appalachian Mountain Club v. Brinegar, 394 F. Supp. 105, 121-22 (D.N.H. 1975)).

[234] 59 Cal. App. 3d 869, 892, 129 Cal. Rptr. 173, 185 (1976).

[235] 39 Cal. App. 3d 830, 842, 115 Cal. Rptr. 67, 75 (1974).

[236] 138 Cal. App. 3d 664, 675-76, 188 Cal. Rptr. 233, 238 (1982).

nificant admission in determining how the proposed general plan would actually operate, since the availability of water and sewage facilities was not the responsibility of the Board of Supervisors. Thus, the response to public comments revealed that the Board had, in effect, delegated the initial general plan designation to water and sewage agencies.

However, the effectiveness of the commenting function has been questioned. A 1979 CEQA study found that the public contributed comments only infrequently, although the study ascribed reasons for this that did not denigrate the public commenting function.[237] There also have been complaints that comments from the public are poorly focused, a result that should be expected given the lack of technical capability of most citizens.[238] Finally, the cost of responding to comments must be considered, since that cost may be significant for hotly disputed proposals.

In sum, the public comment process appears to have had mixed results. But even if the critics are correct that citizen comments have proved ineffective in contributing environmental expertise, that contribution is not the sole measure of whether comments have been useful. The other purpose of the commenting process, the service of democratic ideals, must be considered. In that regard, the dialogue between agency and citizen that the commenting function generates has ensured that rationales behind governmental decisions are more carefully articulated, particularly in the most controversial cases when public involvement is

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[237] SMALL & KNURST, INC., *supra* note 42, at 22. The study, citing 1974 data, concluded:

> The limited extent of public comment as well as the infrequency with which it raised additional impacts or provided additional data can be interpreted in at least two ways. First, local agencies or project proponents are identifying most environmental impacts of potential public concern and are treating them in sufficient detail to preclude the public raising additional impacts or providing additional data. Second, public concern with the CEQA process has diminished to the point where only the most controversial projects are subject to critical public analysis of EIRs.

Id.

[238] Guideline § 15204 attempts to guide citizens in their review of draft EIR's. The section suggests a focus on the sufficiency of the document in identifying and analyzing possible environmental impacts and on mitigation measures and ways to avoid those impacts. It further notes that comments "are most helpful when they suggest additional specific alternatives or mitigation measures that would provide better ways to avoid or mitigate." Reviewers should explain the basis for comments and submit data or references whenever possible. CAL. ADMIN. CODE tit. 14, § 15204 (1983). The comment by the Guideline preparers that accompanies this section states that "[t]he poorly focused comments that have been common in the EIR review process up to now show that there is a need for this kind of guidance."

widespread.

6. The Usefulness of the Agency Commenting Function

The comments submitted by public agencies on environmental documents present different considerations. There are two situations in which a public agency may submit comments on draft environmental documents: when the agency is acting as a "responsible agency,"[239] that is, the agency must approve a project but is not charged with preparing the EIR for it; and when the entity by commenting is merely lending its presumed expertise to the preparation of the document but has no approval power over the project. The performance of agencies in both situations has been criticized.[240]

If the agency is acting as a responsible agency, it first receives a "notice of preparation."[241] This notice requests the agency to list its specific environmental concerns with the project. If the public agency responds properly, the necessity for submitting critical comments on the EIR at a

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[239] CAL. PUB. RES. CODE § 21069 (West 1977) defines a "responsible agency" as "a public agency, other than the lead agency, which has responsibility for carrying out or approving a project." The "lead agency" is the public agency that "has the principal responsibility for carrying out or approving a project which may have a significant effect upon the environment." *Id.* § 21067; *see* Citizens Task Force v. Board of Harbor Comm'rs, 23 Cal. 3d 812, 591 P.2d 1236, 153 Cal. Rptr. 584 (1979) (Port of Long Beach was first agency to act on the project and became the lead agency; Public Utilities Commission was found to be a responsible agency); Bakman v. State Dep't of Transp., 99 Cal. App. 3d 665, 160 Cal. Rptr. 583 (1979) (city's department of transportation was lead agency with primary responsibility for preparing EIR; State Department of Transportation was a responsible agency); *see also* CAL. ADMIN. CODE tit. 14, §§ 15367, 15381 (1983). If there is a dispute between the parties over which agency is to act as the "lead agency," the dispute may be submitted for decision by the Office of Planning and Research (OPR). *Id.* § 15053. OPR has promulgated a set of regulations that it uses on those infrequent occasions when it must make this determination. *See id.* §§ 16000-16041 (1978).

[240] *See, e.g.*, STATE BAR CEQA REPORT, *supra* note 14, at 16.

[241] A "notice of preparation" is sent out by the lead agency to each responsible agency informing them that an EIR will be prepared. The notice "shall provide the responsible agencies with sufficient information describing the project and the potential environmental effects to enable the responsible agencies to make a meaningful response." CAL. ADMIN. CODE tit. 14, § 15082(a)(1) (1983). The responsible agency must respond within 45 days by providing the information requested to the lead agency. The information must include "[t]he significant environmental issues and reasonable alternatives and mitigation measures which the responsible agency will need to have explored in the draft EIR." *Id.* § 15082(b)(1)(A); *see also id.* § 15096 ("Process for a Responsible Agency"; requiring responsible agency to respond to consultation by the lead agency to assist it in preparing adequate environmental documents for a project).

later date is lessened, and at least some of the delay caused by responding to later comments will not occur. In practice, however, the agencies' replies to the notices of preparation have been poor; indeed, one person has termed them "worthless."[242]

Once the EIR is prepared it is circulated for public review, and the responsible agency has the opportunity to submit comments. However, the efforts being put into comments by responsible agencies have been seriously questioned. A 1979 study concluded that the low frequency of substantive comment from state responsible agencies and the limited amount of useful additional data they provide raises doubts regarding the usefulness of responsible agency review of draft EIR's.[243] Still others have decried "standardized comments that many times are unrelated to the particular project" under consideration.[244]

Even if a public agency is not acting as a "responsible agency" and has no approval power over the project, the State EIR Guidelines encourage agencies to participate in the review process by submitting comments on draft EIR's. If a project is of "statewide significance,"[245] a

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[242] *Section-by-Section Discussion of Proposed Amendments to the State EIR Guidelines*, CAL. EIR MONITOR, July 12, 1979, at 4 ("Experience so far has been that notices of preparation have generally provided too little information about projects. Even when a notice provided more information, however, the responses to the notice have generally been worthless."); *see also Response to Consultation*, CAL. EIR MONITOR, Nov. 30, 1978, at 2 ("Lead agencies have received a variety of responses to notices of preparation. The responses range from no response at all to responsible agencies sending back a blank application form and saying they need all the information requested on the application"); Statement of Andi Adams to Cal. State Bar Comm. on the Environment 13 (July 15, 1983) (discussing "several major EIR's where the agencies notified in the NOP process have commented on the Draft EIR when they have not commented in the NOP process, or where the agencies have commented differently on the Draft EIR than they have commented in the NOP Process.") (copy on file with author); Bass, *supra* note 11, at 5 ("The Notice of Preparation . . . has been subject to extensive criticism because the comments received during the 45 days review period are not often worth waiting 45 days to receive.").

[243] SMALL & KNURST, INC., *supra* note 42, at 24. The study continued: "Two survey agencies expressed the opinion that state responsible agency comment was substantive, while seventeen survey agencies felt that state agency comment was not substantive." *Id.*; *see also id.* at 35 ("[S]tate agency comment is, in general, unspecific and of little assistance in treating regional and cumulative impacts. Many local agencies view the comments received from state responsible agencies as nonsubstantive in nature and not worth the delay involved in waiting for State Clearinghouse review.").

[244] Letter from Dean H. Park, Director of Energy Affairs, Sacramento Municipal Utility Dist., to Norman E. Hill, Assistant Secretary for Resources (Sept. 17, 1982) (suggesting that the State Clearinghouse screen comments received from responsible agencies on draft EIR's).

[245] CAL. PUB. RES. CODE § 21083 (West Supp. 1984) requires that the State EIR

local government must send the environmental document for review through the State Clearinghouse. The Guidelines also authorize "any public agency" to submit comments concerning the environmental effects of a project being considered by a lead agency.[246]

In some instances, comments by public agencies have been useful. For example, in *County of Inyo v. City of Los Angeles*,[247] the State Water Resources Control Board submitted what a court later termed an "authoritative comment." The comment focused on what the Water Board believed was an improper formulation of the project by the city. If the city had heeded the Board's concern, it could have avoided the challenge ultimately upheld by the court.[248]

Once again, however, the overall utility of this process has been questioned severely. Doubts have been raised about the expertise of individuals employed by agencies to draft comments, and some have suggested that certain public agencies may forego the opportunity to comment, only to raise the same issue at a later date.[249] Further, the fact that circulation of EIR's to state agencies through the State Clearinghouse requires a forty-five day period has been cited as a delaying factor in the regulatory process, albeit not a critical one.[250]

Guidelines include criteria for public agencies to use in determining when a proposed project is of sufficient statewide, regional, or areawide significance that it should be submitted to a state agency review for notice and comment prior to completion of an EIR or negative declaration. The criteria established by the Resources Agency for comments are set forth in § 15206 of the Guidelines. CAL. ADMIN. CODE tit. 14, § 15206 (1983).

[246] Section 15044 of the Guidelines states that "[a]ny public agency or other person or entity may submit comments to a lead agency concerning any environmental effects of a project being considered by the lead agency." CAL. ADMIN. CODE tit. 14, § 15044 (1983).

[247] County of Inyo v. City of Los Angeles, 71 Cal. App. 3d 185, 198, 139 Cal. Rptr. 396, 405 (1977).

[248] *Id.*

[249] *See, e.g.*, Beckman & Prairie, *A Guide to Obtaining Required Regulatory Approvals for New Industrial Facilities in California*, 17 SAN DIEGO L. REV. 979, 1002 (1980):

> [I]t is not uncommon for an agency, such as the ARB [Air Resources Board] to make few or no comments on a draft EIR when it is initially circulated, but subsequently to object to the issuance of a permit by the local AQMD based on grounds that could and should have been raised at the draft EIR stage.

There are, however, some indications that the quality of comments has improved. *See* Cleary v. County of Stanislaus, 118 Cal. App. 3d 348, 173 Cal. Rptr. 390 (1981).

[250] Legislation passed in 1983 shortened the review period for negative declarations reviewed through the State Clearinghouse from 45 to 30 days. Act of Sept. 9, 1983, ch.

Given this criticism, some have suggested reconsideration of the role of public agency comments.[251] One obvious remedy would be to limit the scope of comments by responsible agencies that must approve a project to include only those impacts falling within the agency's statutory concerns.[252] For example, a responsible agency whose statutory duties concerned water pollution would have to limit any comments on an EIR to this area of expertise. This limitation would be consistent with the 1977 Amendment to CEQA allowing responsible agencies approving a project to consider only the environmental effects of those activities involved in a project that the agency is required by law to approve or carry out.[253]

With respect to comments by public agencies not acting as responsible agencies, a strong case exists for eliminating the requirement of consulting state agencies on all projects of "statewide significance."[254] Instead, the burden could be placed on those agencies interested in a particular project to request the EIR in the same manner as other citizens to comment on it. Further, public agencies that do comment on projects should be required to limit their comments to their specific areas of expertise. Granting free reign for the agency to comment on issues outside its expertise makes little sense.

Finally, state agencies should justify the need for the lengthy forty-five day review period on all EIR's. Unless strong reasons are made for retention, that period should be shortened to coincide with the period to which all other reviewers must adhere.

These changes would be consistent with the purpose of the commenting process discussed above. Of the two policy rationales underlying the commenting process — review as a means of improving environmental decisionmaking and as a means of improving democratic participation

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688, § 1, 1983 Cal. Legis. Serv. 3999, 4000 (West) (codified at CAL. PUB. RES. CODE § 21080.4 (West Supp. 1984)).

[251] *See* STATE BAR CEQA REPORT, *supra* note 14, at 18-22.

[252] The State Bar CEQA Report adopts this recommendation, stating that CEQA should be amended "to require both responsible and other agencies commenting on EIRs to (1) limit their comments to the area of expertise possessed by that agency, and (2) ensure that their comments are supported by specific documentation." *Id.* at 21-22.

Assembly Bill 2583, Act of Sept. 28, 1984, ch. 1514, § 9, 1984 Cal. Legis. Serv. 161, 166, was passed after this Article was completed. Section nine declares that a responsible agency or other public agency shall only make substantive comments regarding those activities involved in a project that are within an area of expertise of the agency, or that the agency must carry out or approve. The legislation further mandates that the comments must be supported by specific documentation.

[253] *See* CAL. PUB. RES. CODE § 21002.1 (West Supp. 1984).

[254] *See supra* notes 239-40 and accompanying text.

— only one applies to public agency comments. There is no implicit democratic "good" in allowing state agencies to comment on environmental documents and requiring responses to those comments. With respect to the applicable policy, the improvement of environmental management, public agencies — particularly those at the state level with expertise in specific fields — undoubtedly could contribute needed expertise to local projects. But the extent of that contribution depends upon the resources committed and efforts expended by those agencies. To date, the resources and efforts often have been insubstantial.

V. THE SUBSTANTIVE EFFECT OF CEQA

Speculation about both CEQA and NEPA has always centered on whether the laws, in addition to their procedural impact reporting requirements, constrain substantive agency decisionmaking by requiring rejection of environmentally damaging projects.[255] The United States Supreme Court, in *Strycker's Bay Neighborhood Council, Inc. v. Karlen*,[256] held that NEPA had a minimal role in substantive decisions. The extent of CEQA's substantive effect, on the other hand, is still not fully resolved. However, the absence of many judicial decisions addressing substantive agency duties under the Act may give some indication concerning the practical effect of the law's substantive mandate.

A. The Development of CEQA's Substantive Provisions

The origins and development of CEQA's substantive provisions are well-documented.[257] The early debate focused on the expression of leg-

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[255] *See* T. SCHOENBAUM, ENVIRONMENTAL LAW AND POLICY 194 (1982); Comment, *The Least Adverse Alternative Approach to Substantive Review Under NEPA*, 88 HARV. L. REV. 735 (1975).

[256] 444 U.S. 223 (1980). The United States Supreme Court declared:

> [O]nce an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot "interject itself within the area of discretion of the executive as to the choice of the action to be taken."

Id. at 227-28 (quoting Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976)). Thus, at least as far as enforceability by a court is concerned, the substantive effect of NEPA is very limited.

[257] *See* Robie, *California's Environmental Quality Act: A Substantive Right to a Better Environment*, 49 L.A.B. BULL. 17 (1973); Seneker, *The Legislative Response to* Friends of Mammoth *— Developers Chase the Will-O'-the-Wisp*, 48 CAL. ST. B.J. 127 (1973); Comment, *Substantive Enforcement of the California Environmental Quality Act*, 69 CALIF. L. REV. 112 (1981); Comment, *Aftermammoth:* Friends of Mammoth

islative intent in the original enactment of Public Resources Code section 21001(d) that one purpose of CEQA was to "[e]nsure that the long-term protection of the environment shall be *the* guiding criterion in public decisions."[258] This was one factor leading to the California Supreme Court's famous dicta in the *Friends of Mammoth* decision that "[o]bviously if the adverse consequences to the environment [described in the environmental impact report] can be mitigated, or if feasible alternatives are available, the proposed activity . . . should not be approved."[259]

Two years later in *Burger v. County of Mendocino*,[260] the court of appeal vacated the approval of an eighty-unit motel that threatened injury to a rare pygmy forest. The decision rested on the procedural ground that the county offered no explanation or evidence indicating why the adverse impacts listed in the EIR had been rejected. The court also noted the absence of evidence that the reduction of the motel from eighty to sixty-four units, or relocation of some units as suggested in the EIR, would make the project unprofitable.[261] The court did not specify what type of explanation or evidence would justify the project's approval. However, since the agency had plainly considered the impact report, the decision stands for the proposition that mere consideration of environmental impacts — apparently all that is required by *Strycker's Bay* — is insufficient.

The court of appeal in *San Francisco Ecology Center v. City & County of San Francisco*[262] also attempted to explain CEQA's substantive requirements. After recognizing that the legislature contemplated approval of some projects adversely affecting the environment, the court found that a project's benefits must be weighed against its environmental risks.[263] However, the values would not be evenly weighted; CEQA required decisionmakers to assign greater priorities to environmental values than economic needs.[264]

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and the Amended California Environmental Quality Act, 3 ECOLOGY L.Q. 349 (1973).

[258] CAL. PUB. RES. CODE § 21001(d) (West Supp. 1984) (emphasis added).

[259] 8 Cal. 3d at 263 n.8, 502 P.2d at 1059 n.8, 104 Cal. Rptr. at 771 n.8.

[260] 45 Cal. App. 3d 322, 119 Cal. Rptr. 568 (1975).

[261] *Id.* at 326-27, 119 Cal. Rptr. at 570. The parties had fully briefed the legal issues concerning the substantive effect of CEQA, but the court declined to address them and instead vacated the decision essentially because no explanation was given for rejecting the information in the EIR. *Id.* at 327, 119 Cal. Rptr. at 570.

[262] 48 Cal. App. 3d 584, 122 Cal. Rptr. 100 (1975).

[263] *Id.* at 589, 122 Cal. Rptr. at 103.

[264] *Id.* at 591, 122 Cal. Rptr. at 104.

Against this background, in 1976 the California Legislature passed amendments to the Act affecting its substantive content.[265] An explicit substantive policy for CEQA was articulated: public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available that would substantially lessen the significant environmental effects of such projects.[266] However, if "specific economic, social, or other conditions make infeasible such project alternatives or mitigation measures," individual projects may still be approved.[267]

In these amendments the legislature required a two-step approach. The public agency first identifies environmental impacts and determines whether there are alternatives or mitigation measures that would avoid the project's impacts. In the second step, the agency broadens its analysis. Still focusing on alternatives and mitigation measures, it determines whether they are "feasible" by considering economics, social factors, and "other conditions." If the public agency can point to specific conditions supporting infeasibility, these alternatives and mitigation measures may be found infeasible, and the balance tilted toward development.[268]

Two factors stand out in this scheme. First, once environmentally superior alternatives or mitigation measures are identified, the analytic emphasis shifts from the project itself to consideration of these alternatives and mitigation steps. In other words, the economic, social, or other conditions supporting the original proposal become irrelevant; rather, the focus is on alternatives and mitigation measures identified in the EIR. Second, CEQA is vague about what facts can make an alternative

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[265] Act of Sept. 28, 1976, ch. 1312, 1976 Cal. Stat. 5888.

[266] CAL. PUB. RES. CODE § 21002 (West Supp. 1984) reads in full:

> The Legislature finds and declares that it is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects, and that the procedures required by this division are intended to assist public agencies in systematically identifying both the significant effects of proposed projects and the feasible alternatives or feasible mitigation measures which will avoid or substantially lessen such significant effects. The Legislature further finds and declares that in the event specific economic, social, or other conditions make infeasible such project alternatives or such mitigation measures, individual projects may be approved in spite of one or more significant effects thereof.

[267] *Id.*

[268] *Id.*

or mitigation measure infeasible.[269] Arguably, a wide variety of nonenvironmental factors would seem to suffice since they would fit within the elastic phrase "other considerations."

To institutionalize this substantive policy, the legislature also required public agencies to make certain findings of fact when approving projects. If an EIR identifies significant effects, the project can be approved only if the agency makes findings that the significant environmental effects have been mitigated or avoided, or that "specific economic, social, or other considerations make infeasible" the mitigation measures or alternatives.[270] The findings requirement applies to all public agency actions, whether quasi-legislative or quasi-judicial, a departure from the normal rule that findings are necessary only when a public agency acts in its adjudicating capacity.[271]

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[269] The statute merely authorizes a finding that specific economic, social, or "other considerations" make infeasible the mitigation measures or project alternatives. *Id.* § 21081 (West 1977).

[270] The findings requirement is contained in CAL. PUB. RES. CODE § 21081 (West 1977):

> Pursuant to the policy stated in Sections 21002 and 21002.1, no public agency shall approve or carry out a project for which an environmental impact report has been completed which identifies one or more significant effects thereof unless such public agency makes one, or more, of the following findings:
>
> (a) Changes or alterations have been required in, or incorporated into, such project which mitigate or avoid the significant environmental effects thereof as identified in the completed environmental impact report.
>
> (b) Such changes or alterations are within the responsibility and jurisdiction of another public agency and such changes have been adopted by such other agency, or can and should be adopted by such other agency.
>
> (c) Specific economic, social, or other considerations make infeasible the mitigation measures or project alternatives identified in the environmental impact report.

[271] Findings are required when an administrative agency acts in a quasi-judicial capacity and its acts are reviewable under CAL. CIV. PROC. CODE § 1094.5 (West Supp. 1984). If the agency is acting in a quasi-legislative capacity, review is conducted under *id.* § 1085 (West 1980). *See* Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 522 P.2d 12, 113 Cal. Rptr. 897 (1974); Ensign Bickford Realty Corp. v. City Council, 68 Cal. App. 3d 467, 137 Cal. Rptr. 304 (1977); BRIDGING THE GAP, *supra* note 109, at 2-3.

B. Laurel Hills *and Its Aftermath*

1. The *Laurel Hills* Decision

Since the passage of the 1976 amendments, only one decision has fully addressed CEQA's substantive effect on a decision to approve a project. The fact situation in *Laurel Hills Homeowners Association v. City Council*[272] provided an excellent test case for determining the extent of the Act's substantive requirements. The city approved a subdivision map authorizing construction of ninety-five homes in a mountainous area, rejecting the original 126 units requested by the developer. The approval was made subject to a variety of mitigation conditions, including actions taken to mitigate the project's effects on traffic and on land alterations from grading. The EIR for the project, however, explicitly found that a sixty-three unit cluster was an environmentally superior alternative. In approving the ninety-five units, the city made no finding that this alternative was infeasible.[273]

Plaintiff challenged the project, arguing that approval was inappropriate absent a finding regarding the feasibility of the sixty-three unit cluster alternative. The appellate court rejected the argument, declaring that no finding on the feasibility of a project alternative was necessary "if the feasible mitigation measures substantially lessen or avoid generally the significant adverse environmental effects of a project."[274] The court defined CEQA's purpose as the prevention of avoidable damage to the environment. In its view, if this could be accomplished solely through the imposition of feasible mitigation measures, project alternatives were irrelevant.[275] The court went on to assert that under the *Friends of Mammoth* rule, the agency could approve a project once its significant adverse environmental effects "have been reduced to an ac-

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[272] 83 Cal. App. 3d 515, 147 Cal. Rptr. 842 (1978).

[273] *Id.* at 522, 147 Cal. Rptr. at 846.

[274] *Id.* at 521, 147 Cal. Rptr. at 845. The court first found that Public Resources Code §§ 21002 and 21002.1, which set out CEQA's substantive policy, were applicable to the *Laurel Hills* factual situation. The provisions themselves did not take effect until 1977, while the tentative tract map at issue in the case was approved one year earlier. The legislation adopting §§ 21002 and 21002.1 explicitly refused to take a position on whether the policies set forth in those statutes were merely declaratory of existing law. *Laurel Hills*, 83 Cal. App. 3d at 520, 147 Cal. Rptr. at 845 (citing A.B. 2679, § 21). The court, however, found them applicable because the language in the sections so closely tracked the supreme court's language in footnote eight of the *Friends of Mammoth* decision.

[275] *Id.* at 521, 147 Cal. Rptr. at 845.

ceptable level — that is, all avoidable significant damage to the environment has been eliminated, and that which remains is otherwise acceptable."[276]

The decision can be criticized on two grounds. First, and most important, the court's reasoning misapplies the fundamental *Friends of Mammoth* precept. CEQA must be interpreted to provide the fullest possible protection to the environment within the reasonable scope of the statutory language.[277] Thus, if two interpretations of statutory language in the Act are possible, the court must choose the more environmentally protective one. Curiously, the *Laurel Hills* court relied on this statement in its decision.[278]

The statutory language at issue does have two possible constructions. Public Resources Code section 21002 declares that the procedures required by CEQA "are intended to assist public agencies in systematically identifying both the significant effects of proposed projects and the feasible alternatives *or* feasible mitigation measures which will avoid or substantially lessen such effects."[279] Furthermore, Public Resources Code section 21002.1 also speaks of the EIR's purpose as indicating the manner in which "such significant effects can be mitigated *or* avoided."[280] The *Laurel Hills* opinion concentrates on what it terms this "alternative nature of mitigation measures and project alternatives."[281]

The alternative statutory constructions arise in a situation, such as that presented by *Laurel Hills*, when there is a project with mitigation measures and an alternative that reduces environmental damage more than the mitigated project. Assuming the mitigated project and environmentally superior alternatives are both feasible, the optional statutory interpretations are (1) the agency has its choice — it can adopt either the alternative *or* the originally proposed project as mitigated regardless of which is more protective of the environment; or (2) the agency has no choice. First it must examine the environmentally superior alternative, since that is the option that reduces the maximum amount of environmental damage. It must adopt that alternative unless the agency

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[276] *Id.* The court continued to comment: "In other words, CEQA does not mandate the choice of the environmentally best feasible project if through the imposition of feasible mitigation measures alone the appropriate public agency has reduced environmental damage from a project to an acceptable level." *Id.*

[277] *Friends of Mammoth*, 8 Cal. 3d at 259, 502 P.2d at 1056, 104 Cal. Rptr. at 768.

[278] 83 Cal. App. 3d at 521-22, 147 Cal. Rptr. at 845-46.

[279] CAL. PUB. RES. CODE § 21002 (West Supp. 1984) (emphasis added).

[280] *Id.* § 21002.1(a) (emphasis added).

[281] 83 Cal. App. 3d at 520, 147 Cal. Rptr. at 845.

finds it infeasible. If that alternative is infeasible, then the agency may use its second priority, the project with mitigation measures, and must adopt that unless infeasible.

The court rejected the second interpretation, stating that if this construction were adopted, "the fundamental purpose of CEQA would become the mandatory choice of the environmentally best feasible project."[282] Instead, the court permitted the agency to choose between the two options providing the second possibility — the project with mitigation measures — reduced environmental damage to an "acceptable level."[283]

This approach directly contradicts the fundamental *Friends of Mammoth* principle of CEQA interpretation. Given the two options, the second provides the fullest possible protection; therefore, that interpretation of the statutory language would have to be adopted.[284]

Laurel Hills may also be criticized for its use of the open-ended term "acceptable level." The phrase is not found in the statutory language and gives rise to the obvious question: what is an "acceptable level?" The State EIR Guidelines have grappled with the problem, but the current formulation only highlights the conceptual difficulty with *Laurel Hills*. Section 15092 of the State EIR Guidelines provides that a public agency shall not approve or carry out a project unless either all significant effects have been eliminated or the agency has "(A) Eliminated or substantially lessened all significant effects on the environment *where feasible* . . ., and (B) Determined that any *remaining* significant effects on the environment found to be unavoidable under Section 15091 are acceptable due to overriding concerns."[285] Thus, according to

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[282] *Id.* at 520, 147 Cal. Rptr. at 846.

[283] *Id.* at 521, 147 Cal. Rptr. at 845-46.

[284] Another commentator has addressed this point:

> If, as the petitioners argued and the court held, the 1976 amendments were declaratory of preexisting laws as expressed in *Friends of Mammoth*, that decision must be used to explain the meaning of the amendments. *Friends of Mammoth* indicated that the new CEQA provision should be read to require that either a preferable alternative or mitigation measures be chosen, whichever provides the "fullest possible protection," so long as the chosen method is feasible. If avoidable damages can be prevented by going beyond the mitigation measures to the original proposal by selecting the environmentally preferable alternative, as may be the case in most circumstances, this must be done. This is a far cry from the *Laurel Hills* court's holding . . . .

Comment, *CEQA's Substantive Mandate Clouded by Appellate Court*, 8 ENVTL. L. REP. 10,208, 10,210 (1978).

[285] CAL. ADMIN. CODE tit. 14, § 15092(b)(2) (1983) (emphasis added).

the Guidelines the "acceptable level" is whatever remaining level of impacts the agency determines is acceptable *after* it has eliminated or lessened other effects when feasible.

The difficulty with this analysis is that, in *Laurel Hills*, the public agency never carried out the requirement of subdivision (A). The EIR explicitly found the sixty-three unit condominium cluster alternative was environmentally superior. Accordingly, in the words of the Guidelines, that alternative would have "eliminated or substantially lessened" the environmental effects.[286] The only question was whether it was feasible, and petitioners' central claim was that its feasibility was never examined. "Petitioners argue . . . that in this case the city violated CEQA because it did not find that specific conditions made infeasible the environmentally superior 63 unit cluster-condominium project identified in the environmental impact report."[287] The court explicitly found that such a finding was unnecessary.[288]

As a result, the Guidelines' formulation of how the term "acceptable level" fits into the CEQA analysis does not conform to *Laurel Hills*. The term remains open-ended. As long as some mitigation occurs, the level of environmental damage remaining can be deemed "acceptable" by a public agency, and the project may be approved despite the existence of an environmentally superior alternative.

2. Future Litigation Over Substantive Issues

Given the uncertainty generated by the *Laurel Hills* reasoning,[289] one might have expected other litigation on the same general issue of CEQA's substantive effect. However, while subsequent cases have addressed the findings requirement established by Public Resources Code section 21081,[290] no cases have concerned the substantive effect of the Act. The paucity of litigation suggests that plaintiffs perceive substantive causes of action as difficult ones to win.

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[286] *Id.* § 15092(b)(2)(A).

[287] *Laurel Hills*, 83 Cal. App. 3d at 520, 147 Cal. Rptr. at 845.

[288] *Id.* at 520, 147 Cal. Rptr. at 844.

[289] The comments to § 15092 of the State EIR Guidelines observe that when the draft Guidelines were sent out for public review, the responses received "reflected a great deal of uncertainty about the concept of an 'acceptable level.' "

[290] This requirement was not applicable in *Laurel Hills* since the procedural formality was not in effect when the city approved the project. *See* Residents Ad Hoc Stadium Comm. v. Board of Trustees, 89 Cal. App. 3d 274, 282, 152 Cal. Rptr. 585, 590 (1979) ("Section 21081 was approved by the legislature on September 28, 1976, and became operable January 7, 1977; the Trustees made their determination on May 26, 1976. The Trustees' failure to make findings was consistent with then-existing law.").

That view is probably accurate for several reasons. First, until recent years many EIR's — unlike the explicit report prepared by the City of Los Angeles in the *Laurel Hills* case — failed to clearly identify what alternatives were environmentally superior.[291] This reluctance is especially understandable, if not excusable, in EIR's prepared by consultants under contract to a project applicant. However, without the identification of a specific environmentally superior alternative, litigants taking the position that a project should have been disapproved because there was a feasible alternative could not succeed.[292]

The other likely reasons for the lack of litigation over substantive issues are more subtle; they raise questions concerning the utility of a substantive cause of action as a means of protecting the environment. A chief difficulty in applying CEQA's substantive provisions lies in the nature of what is an environmentally superior alternative. In many instances, an alternative reducing the density of a proposal necessarily will be environmentally superior, since a smaller project almost always

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[291] In 1979 the Resources Agency first proposed amending the State EIR Guidelines to require that an EIR identify an environmentally superior alternative. The reason given for proposing the change was that "[a]n environmentally superior alternative is a good point of reference for analyzing alternatives to the project" and this would promote interchangeability with environmental impact statements prepared under NEPA. CAL. EIR MONITOR, July 24, 1979, at 6. The statement of reasons also noted that "[i]n most cases it would be all too easy to use the no-project alternative as the environmentally superior alternatives [sic]." Accordingly, the amendment provided that when the environmentally superior alternative was listed as the no-project alternative, the document also should list another environmentally superior alternative. *Id.* The regulation adopted stated in pertinent part that "[if] the environmentally superior alternative is the 'no project' alternative, then the EIR shall also identify an environmentally superior alternative among other alternatives." CAL. ADMIN. CODE tit. 14, § 15143(d) (currently CAL. ADMIN. CODE tit. 14, § 15126(d)(2) (1983)).

[292] The difficulty is illustrated by a situation arising prior to the comprehensive revision of the State EIR Guidelines undertaken in 1982-83. In its comment to § 15126, the Resources Agency noted that "some agencies have directed their EIR writers not to label effects as significant," proposing instead to reserve decisions concerning whether an impact is "significant for the decision making body itself." The Guidelines preparers objected to this, reasoning that because CEQA requires an EIR to analyze the significant effects of a project, the selection of an impact for analysis by implication identifies that impact as significant. This occurs before the EIR reaches the decisionmakers. *Id.* The Resources Agency also commented that because the lead agency preparing the EIR must make a finding on each significant effect, the document must contain designations of significance. However, the statement notes that the decisionmaking body retains the power to change those designations if it wishes, citing Cleary v. County of Stanislaus, 118 Cal. App. 3d 348, 173 Cal. Rptr. 390 (1981). A consultant under contract to a developer (or even to the public agency itself) would have great difficulty refusing to comply with such an order.

reduces at least some of the original proposal's environmental impacts.[293] But, under this reasoning, there is no logical end to the "reduced alternatives" that will be environmentally superior. Reduction in size will produce a reduction in impacts until the alternative of "no project" is reached.

Fairness issues also make enforcement of CEQA's substantive provisions through the judicial process difficult. If the project applicant is a developer proposing construction at a specific site, the EIR could suggest another location as an environmentally superior alternative. However, if that other location is not owned by the project applicant, disapproval of the chosen location would mean dropping the project. A court's view of the reasonableness of that result might cause a potential plaintiff to think twice about raising it.

Another fairness issue concerns the nature of a project's environmental impacts that cause an alternative to the project to be environmentally preferable. Often the original proposal's impacts are regional and thus only partly caused by the project itself. Traffic impacts fit into this category. For example, in *Laurel Hills* the EIR recognized traffic as a significant impact, but observed that this was a regional problem.[294] The need to argue that disapproval of a project should occur because of impacts mostly generated by previous project approvals is defensible from an environmental perspective. However, a court might balk at finding a substantive violation on the grounds that regional impacts require disapproval of the project.

A final and perhaps most significant factor concerns the rigor of the CEQA substantive standard. The Act sets forth a policy that alternatives or mitigation measures reducing environmental impacts should be adopted unless they are infeasible. The extent to which information in an impact report constrains an agency from approving a proposal therefore turns on the agency's ability to find that alternatives and mitigation measures are infeasible. On this point CEQA's definition of the word "feasible" invests public agencies with wide discretion to determine that an alternative or mitigation measure is not feasible. The factors that can buttress a determination of infeasibility can be economic,

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[293] *See* CAL. EIR MONITOR, July 24, 1979, at 6 (noting in a discussion of a proposed change to Guidelines that it would be easy to use the no-project alternative as the environmentally superior alternative); Comment, *Substantive Enforcement of the California Environmental Quality Act*, 69 CALIF. L. REV. 112, 132 (1981).

[294] 83 Cal. App. 3d at 523, 147 Cal. Rptr. at 847 ("The regional traffic problem is an issue of Citywide concern to which no adequate solution currently exists.").

social, or "other considerations."[295] Accordingly, the agency is constrained very little in its ultimate choice whether to approve a project, whatever the impacts are.

Perhaps as a result of these factors, few cases have challenged approval of a project on the ground that CEQA's substantive provisions preclude this approval choice. Rather, cases have focused on procedural issues, such as the adequacy of the EIR.[296] This is not to say, however, that the substantive provisions of CEQA are useless. It only means that the Act places wide discretion in the hands of public agencies to consider environmental impacts in approving development approvals, and that plaintiffs cannot easily challenge the exercise of that discretion in court. In fact, the evidence does indicate that the CEQA process has resulted in improved environmental protection. Projects have been changed to reduce impacts through the use of mitigation measures either negotiated with the developer or imposed by the agency as conditions. As the State Bar's CEQA Report comments, "[s]peakers also noted that since the advent of CEQA projects are designed better, largely because of modifications in the project and mitigation measures undertaken to meet the concerns identified in the CEQA documentation."[297]

The costs incurred to reach this result are substantial, and the regulatory delay CEQA entails cannot be dismissed lightly. In any evaluation of CEQA's ultimate worth, these two factors must be weighed. But the result itself, an improvement in environmental protection, seems unquestionable.

While predictions concerning the course of future litigation are problematic, it may be significant that the characteristics identified above to explain the lack of substantive CEQA decisions apply particularly to one type of project — a land use development such as a subdivision. A large number of projects considered at the local level fall in this category. Although such projects are subject to these "fairness" considerations, if the characteristics of the project in question differ from those of a traditional land use development, enforcement of CEQA's substantive provisions is more likely. If an EIR identifies an environmentally supe-

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[295] CAL. PUB. RES. CODE 21081 (West 1977).

[296] *See supra* text accompanying notes 150-83.

[297] STATE BAR CEQA REPORT, *supra* note 14, at 7. The 1979 study, citing an earlier work, found that approximately 60% of the adverse effects for which mitigation is proposed in the EIR are in fact being mitigated. SMALL & KNURST, INC., *supra* note 42, at 29. The report also concluded that local agencies have difficulty dealing with adverse impacts that are complex in nature, incremental in their effect, and regional in their scope. *Id.* at 36.

rior alternative that is not merely a scaled-down version of the original proposal and that does not involve a change in location, questioning the feasibility of the alternative becomes more difficult.

The Owens Valley water litigation provides an example. That factual situation concerns a project designed to increase the amount of water available for use in Los Angeles. However, alternatives may exist that would meet the project's goals while not raising the types of fairness issues discussed above. In the second *Inyo* opinion, the appellate court pointedly noted that the EIR had omitted "a tangible, foreseeably effective plan for achieving distinctly articulated water conservation goals within the Los Angeles service area."[298] In the future, this type of alternative, with the potential to fulfill entirely the goals of the project proponents while at the same time reducing environmental damage, would be an attractive case in which to test the substantive effect of CEQA.[299]

C. Implementing the Substantive Policy: The Findings Requirement

1. Failure to Make Findings

In contrast to the dearth of decisions challenging approvals on substantive grounds, a number of cases have litigated the procedural findings requirement established by Public Resources Code section 21081. As indicated above, this statute requires findings that alternatives or mitigation measures are infeasible before a project with significant environmental impacts can be approved.[300]

The law of findings in California is relatively settled since findings are commonly required of public agencies. Perhaps because a body of case law on findings is available, plaintiffs have often raised this is-

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[298] County of Inyo v. City of Los Angeles, 71 Cal. App. 3d 185, 203, 139 Cal. Rptr. 396, 408 (1977). The court noted it was doubtful whether the EIR could fulfill CEQA's demands without proposing "so obvious an alternative," but also commented that this alternative was one "freighted with costs other than dollars." *Id.* Nonetheless, the attorney for plaintiff in this litigation has expressed doubts about CEQA's usefulness as a groundwater management tool. *See* Rossman & Steel, *Forging the New Water Law: Public Regulation of Proprietary Groundwater Rights*, 33 HAST. L.J. 903, 904, 916-25 (1982).

[299] Another situation might be a case when a reduction in the project to minimize environmental damage occurs without otherwise conflicting with the project proponent's goals. *See, e.g.*, Burger v. County of Mendocino, 45 Cal. App. 3d 322, 119 Cal. Rptr. 568 (1975).

[300] *See supra* text accompanying notes 266-70.

sue.[301] The simplest case, of course, is the situation in which the public agency totally neglects to make any findings. That was precisely what occurred in *Cleary v. County of Stanislaus*.[302]

The analysis in *Cleary* was straightforward. The EIR adopted by the county identified certain significant environmental impacts caused by the project, a general plan change from agriculture to planned development. However, because section 21081 mandates findings if the agency approves a project "for which an environmental impact report has been completed which identifies one or more significant effects," the county erred by failing to adopt findings explaining why alternatives to the project and mitigation measures were not feasible.[303] The same result was reached in *Environmental Council of Sacramento v. Board of Supervisors*,[304] in which the Board voted to change the conclusion of an EIR that certain impacts were "significant" to one stating that the impacts in the document were "less than significant." However, because the discussion in the EIR was not changed and still identified significant impacts, section 21081 findings regarding the feasibility of alternatives and mitigation measures remained necessary.[305]

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[301] This development was predicted correctly in an article that appeared in early 1977, after the 1976 changes to CEQA (which included the addition of the findings requirement of Public Resources Code § 21081), had taken effect. The article observed that:

> In the past, challenges have centered on the failure of the public agency to prepare an EIR and on whether the EIR was adequate . . . . In the future, the focus of CEQA litigation will probably shift to the issue of whether the findings required by Section 21081 were made correctly and whether they were supported by substantial evidence in the record . . . ."

Presentation to the City Attorney's Division, League of California Cities, San Diego, Cal. (October 18, 1976), *reproduced in* CAL. EIR MONITOR, Mar. 18[22], 1977, at 61 (citation omitted). The author commented that public agency attorneys would have to practice additional preventive law to avoid litigation over findings. *Id.* at 62.

The importance of findings was stressed in comments by a consulting firm on proposed revisions in the CEQA Guidelines in 1982. The author argued that because of litigation, the findings sections of the Guidelines have become so important to the defensibility of the decisionmaking process "that a whole new class of environmental documents has evolved, generally requiring the services of attorneys, to fully document the actions of local decision-makers." He suggested that the Guidelines specify standards for adequate treatment of findings. Letter from Larry Seeman to Norman E. Hill, Assistant Secretary for Resources (Sept. 15, 1982).

[302] 118 Cal. App. 3d 348, 173 Cal. Rptr. 390 (1981).

[303] *Id.* at 362, 173 Cal. Rptr. at 398.

[304] 135 Cal. App. 3d 428, 185 Cal. Rptr. 363 (1982).

[305] *Id.* at 439, 185 Cal. Rptr. at 368. The court concluded that it was within the power of the Board of Supervisors to make such a change because it is the decisionmaking body of a public agency that is required to certify the EIR as completed and cited

In short, the courts have treated the findings requirement established by Public Resources Code section 21081 exactly as they have treated other statutes requiring a public agency to make findings. Unless the agency explains why an alternative or mitigation measure that would reduce environmental damage was not adopted, the agency's approval will be invalidated.

2. Inadequate Findings

The development of CEQA findings law was further extended in *Village Laguna of Laguna Beach v. Board of Supervisors.*[306] Plaintiffs challenged findings adopted by the Orange County Board of Supervisors in approving a general plan amendment. The Board made a generalized finding that "[s]pecific economic, social, technological or other considerations make improbable the mitigation measures or project alternatives identified to reduce the effects of some significant environmental effects of the plan."[307] A series of other findings attempting to describe why adverse effects were being allowed to occur were also set forth. These findings stated that the "no development" alternative could mitigate those effects, but that this alternative was economically infeasible.[308]

The appellate court held the findings deficient in two respects. First, Public Resources Code section 21081 requires the delineation of the specific economic, social, or other considerations that "make infeasible the mitigation measures or alternatives."[309] The findings prepared by the county addressed only one of the alternatives discussed in the EIR and therefore were deficient.[310] At the same time, the Board's explanation that the project's social benefits of providing housing, employment,

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former Guidelines § 15085(g).

[306] 134 Cal. App. 3d 1022, 185 Cal. Rptr. 41 (1982).

[307] *Id.* at 1033, 185 Cal. Rptr. at 47.

[308] *Id.*

[309] CAL. PUB. RES. CODE § 21081 (West 1977).

[310] The court stated that "there is no discussion of the other EIR alternatives and no explanation of why the alternative that is mentioned is economically infeasible." 134 Cal. App. 3d at 1034, 185 Cal. Rptr. at 47. The statute on its face requires a feasibility finding on the alternatives whenever an EIR identifies significant impacts and does not single out alternatives that reduce the environmental damage. In other words, the plain meaning of the statute would also require findings for an alternative, such as the high density alternative proposed in the *Village Laguna* EIR, which had greater environmental impacts than the adopted proposal. The court's statement that the Board erred in not discussing the other EIR alternatives seemingly requires a finding as to *all* other alternatives identified in the EIR.

and recreational opportunities "override the plan's impact on non-renewable resources" was declared insufficient. Although this finding showed the general social considerations rendering the one alternative infeasible, it did not fulfill the requirement that findings set forth enough detail to facilitate examination of the Board's reasoning process in reaching its determination.[311]

The *Village Laguna* reasoning is unassailable. The county's failure to make findings regarding the feasibility of all alternatives mentioned in the EIR squarely contradicted the statutory command of section 21081. That section uses the plural "alternatives" in its mandate that the feasibility of alternatives in an EIR be addressed.[312] Additionally, the county's failure to explain the infeasibility of the one alternative it did address was objectionable under *Topanga Association for a Scenic Community v. County of Los Angeles*,[313] in which the supreme court stated plainly that when an agency adopts findings it must also adopt "legally relevant subconclusions." Their purpose is to bridge the gap between the evidence in the record (here the content of the EIR and the other evidence before the county) and the relevant statutory conclusion (that the alternative was not feasible). In short, the *Village Laguna* holding closely tracked earlier case law.

The reasoning of one other case involving the findings requirement is

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[311] The State EIR Guidelines adopt the position that findings made pursuant to § 21081 must include "one or more written findings for *each* of those significant effects" identified in the EIR, accompanied by a brief rationale for each finding. CAL. ADMIN. CODE tit. 14, § 15091(a) (1983) (emphasis added). The Resources Agency, in the comment to this guideline, reasons that although the guideline is unclear whether a separate finding must be made for each significant effect, separate findings should be required because the findings "may be different for each effect and because the facts to support the findings would probably be different for each effect." The Agency further opines that this approach was upheld in Cleary v. County of Stanislaus, 118 Cal. App. 3d 348, 173 Cal. Rptr. 390 (1981).

The agency is correct that the statute is not clear on this point. It only mandates that if the EIR identifies significant effects, the agency must make one of several findings, including that "specific economic, social or other considerations make infeasible the mitigation measures or project alternatives identified in the environmental impact report." CAL. PUB. RES. CODE § 21081(c) (West 1977). Logic would dictate that the agency's interpretation is correct, since it may take a combination of alternatives and mitigation measures to address all the significant impacts. Nonetheless, the *Cleary* case did not endorse this interpretation. The court only stated that, given the adoption of an EIR identifying significant impacts, "the Board was required to make one or more of the findings set forth in section 21081." 118 Cal. App. 3d at 362, 173 Cal. Rptr. at 397. There was no approval of the position taken in the Guidelines.

[312] CAL. PUB. RES. CODE § 21081 (West 1977).

[313] 11 Cal. 3d 506, 516, 522 P.2d 12, 18, 113 Cal. Rptr. 836, 842 (1974).

more troublesome. In *City of Lomita v. City of Torrance*,[314] a city unsuccessfully sought to set aside the approval of a master plan for the development of a municipal airport, apparently alleging that the section 21081 findings were inadequate. The respondent, a city adjacent to Lomita, was required to adopt findings because the EIR concluded that operating the airport would cause significant adverse environmental impacts.[315] The findings themselves declared that these adverse effects "mainly are found either not to exist, to be of short-term duration or able to be mitigated as indicated in the report."[316] They concluded that even though some of these consequences could not be completely eliminated, "the public interest generally would be served by adoption of the plan as a matter of overriding public interest which outweighs any unmitigated impacts which may be generated thereby."[317]

At least on the face of the court's decision, the section 21081 findings fail to indicate either the "changes or alterations required or incorporated into the project" that would mitigate or avoid the significant effects, or the specific considerations that make those mitigation measures or alternatives infeasible. The court apparently approved the content of the findings even though they suffer from the same defect condemned in *Village Laguna*: failure to specify the facts that underlie the general conclusion.[318]

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[314] 148 Cal. App. 3d 1062, 196 Cal. Rptr. 538 (1983).

[315] The trial court's findings stated that the final EIR identified the significant effects of the Airport Master Plan, and that these effects were reduced to an acceptable level. *Id.* at 1067, 196 Cal. Rptr. at 541.

[316] *Id.* at 1071, 196 Cal. Rptr. at 544.

[317] The Board's findings read as follows:

> (a) The Environmental Impact Report has made known to the City Council and all other affected persons all known possible environmental consequences of the master plan, along with alternatives thereto and mitigation measures therefor, and the same have been reviewed and considered by the City Council.
>
> (b) That the suggested adverse environmental effects of the plan raised in the Environmental Impact Report, in the comments to the Environmental Impact Report, in the revisions to the Environmental Impact Report and comments thereto, mainly are found either not to exist, to be of short-term duration or able to be mitigated as indicated in the report.
>
> (c) That even though there may be some environmental consequences of the plan which cannot be completely eliminated, the public interest generally would best be served by adoption of the plan as a matter of overriding public interest, which outweighs any unmitigated impacts which may be generated thereby.

Id. at 1071, 196 Cal. Rptr. at 544.

[318] The court, after quoting the findings, stated only that "[i]n our view, no more

The court's discussion of this question may be dicta, as it is unclear plaintiffs actually were alleging a violation of section 21081.[319] If it is not dicta, the court's reasoning is suspect, since the opinion seems to validate a set of findings that do not fulfill the statutory requirements of Public Resources Code section 21081.

Because of the familiarity of attorneys with the concept of findings as they are often reviewed under Code of Civil Procedure section 1094.5, further development of case law in this area is almost certain to occur.[320] Four areas seem ripe for exploration. First, the mere adoption of correctly framed findings will not ensure compliance with Public Resources Code section 21081. The court in *Village Laguna* quoted the supreme court's *Topanga* decision for the proposition that there must be disclosure of the "analytic route the agency traveled from evidence to action."[321] The *Topanga* court also referenced the established adminis-

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was required. The judgment appealed from is affirmed." *Id.*

[319] The opinion set forth the City of Lomita's contentions, summarizing in part the city's allegation that the EIR was prepared "without a specific finding by the Torrance City Council that it was 'completed in compliance with CEQA . . . and the state Guidelines,' as required by 14 California Administrative Code § 15085(g)." *Id.* at 1068, 196 Cal. Rptr. at 542. Section 15085(g) at that time required the lead agency to certify that the final EIR has been completed in compliance with CEQA and the state Guidelines. CAL. ADMIN. CODE tit. 14, § 15085(g) (repealed 1983). Because the remainder of the City of Lomita's contentions had nothing to do with the findings required by § 21081, it is unclear whether the validity of the findings was an issue before the court and necessary to its decision.

[320] One other appellate case, Markley v. City Council, 131 Cal. App. 3d 656, 182 Cal. Rptr. 659 (1982), discusses the findings requirement. In that case the court began its analysis of the findings issue by noting that § 21081 "requires findings regarding only *significant* environmental impacts identified in the EIR. None of the impacts cited by appellant are so identified in the EIR." *Id.* at 670, 182 Cal. Rptr. at 668 (emphasis in original). However, the court later implied that some of the impacts were significant, noting that the various documents "discussed the impact of the proposed project, determined the adverse environmental impacts to be insignificant *or merely cumulative* and, even if cumulative, imposed feasible mitigation." *Id.* at 671, 182 Cal. Rptr. at 669 (emphasis added). The court analyzed the record, concluding that "respondents found that the adverse impacts, whether significant or not, were sufficiently mitigated; and that further mitigation or alternatives were unfeasible." *Id.* at 672, 182 Cal. Rptr. at 669.

Because the court never examined the specific findings adopted, stating only that "environmentally superior but economically infeasible alternatives and mitigation measures are identified" in the findings, *id.* at 670, 182 Cal. Rptr. at 668, the court's conclusions regarding the validity of the findings cannot be analyzed. In any event, the court's statement that there were no significant effects may mean that the remainder of the discussion regarding findings is dicta.

[321] 134 Cal. App. 3d at 1035, 185 Cal. Rptr. at 48 (quoting *Topanga*, 11 Cal. 3d

trative law principle that substantial evidence in the administrative record must support any findings made.[322] Accordingly, evidence must be included in the administrative record supporting any conclusions that alternatives or mitigation measures are infeasible. The existence of that evidence will probably be challenged by plaintiffs in the future.

Second, as noted above,[323] Public Resources Code section 21081 requires the agency to list the reasons why the alternatives and mitigation measures were *not* feasible, rather than the reasons why the project as originally proposed *was* a feasible one. The temptation for the approving public agency is to draft a finding that expresses the "infeasibility" of an alternative solely in terms of the reason why the project as proposed is needed. Findings couched in those terms are likely to be challenged.[324]

A related area concerns whether the findings requirement will be satisfied by generalized statements concerning the economy or social conditions in the area. Section 21081 mandates a listing of the "specific" reasons why the alternative or mitigation measure is not feasible. To the extent that the findings refer to reasons that might apply to *any* project wherever located, rather than specifically to the project that the agency is approving, it may be argued that the statute has been violated.[325]

Finally, we can expect litigation testing whether section 21081 requires findings for *each* significant environmental impact identified in an EIR. The statute is silent on this point, mandating findings only for "alternatives and mitigation measures."[326] Since those alternatives and measures are examined in the EIR solely for the purpose of alleviating environmental impacts, it is logical that a finding may be needed as to why an alternative or mitigation measure is infeasible for each of those impacts. Because of the importance of this question, future litigation will certainly raise this issue.

506, 515, 522 P.2d 12, 17, 113 Cal. Rptr. 836, 841 (1974)).

[322] 11 Cal. 3d at 514-15; 522 P.2d at 17; 113 Cal. Rptr. at 841.

[323] *See supra* text accompanying notes 320-21.

[324] *See* discussion of § 15091 accompanying the STATE EIR GUIDELINES, *supra* note 18 (agency must make ultimate findings, called for by the statute, on the feasibility of alternatives and mitigation measures).

[325] Public Resource Code §§ 21002 and 21081 both refer to "specific economic, social, or other conditions making a project infeasible." CAL. PUB. RES. CODE §§ 21002, 21081 (West Supp. 1984). Section 21002.1, in contrast, uses the phrase "economic, social or other considerations" without the prefatory word "specific." *Id.* § 21002.1 (West 1977).

[326] CAL. PUB. RES. CODE § 21081 (West 1977).

VI. The Courts, the Guidelines, and the Administration of CEQA

Until this point, the Article has focused on the judicial treatment of certain major issues arising under CEQA. The administration of CEQA by public agencies has largely been beyond its purview.[327] However, a discussion of the judicial development of the Act would be incomplete without addressing the role that the courts have played in the development of the CEQA Guidelines. The judicial treatment of those Guidelines has been significant in two respects: the weight that the courts have accorded administrative interpretations of CEQA included in the Guidelines and the effect of litigation on the administrative process as that process is embodied in the Guidelines.

In both respects the judicial treatment of the Guidelines has been the principal factor in what may be the single most important development in CEQA administration: a dramatic shift of power away from local discretion to the state level. In order to understand this, the role that the Guidelines have played in the overall development of CEQA must be summarized.

A. The Increasing State Presence in CEQA Implementation

As the implementing procedures for CEQA have evolved, one unmistakable fact has emerged: state government's role in administering the Act has increased. This increase stems chiefly from the enormous expansion in the CEQA Guidelines since their original adoption. More than any single factor, environmental impact reporting procedures are now guided by a complex and detailed set of regulations adopted at the state level.

The increasing state control of CEQA implementation is part of a larger trend evident during the last decade in the environmental protection area. In the 1970's, the legislature passed a variety of laws designed to protect the environment that limited local government discretion. These include general planning laws,[328] coastal protection stat-

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[327] Articles discussing the administrative process by which public agencies implement CEQA's provisions include: Bendix, *A Short Introduction to the California Environmental Quality Act*, 19 Santa Clara L. Rev. 521 (1979); Hildreth, *Environmental Impact Reports Under the California Environmental Quality Act: The New Legal Framework*, 17 Santa Clara L. Rev. 805 (1977); and Sahm, *Project Approval Under the California Environmental Quality Act: It Always Takes Longer Than You Think*, 19 Santa Clara L. Rev. 579 (1979).

[328] *See* Cal. Gov't Code §§ 65300-65761 (West 1983 & Supp. 1984). California local governments are required to prepare a general plan to guide future development

utes,[329] and solid waste management controls.[330] Some of these constrain the local government's substantive decisionmaking abilities, while others include state-mandated procedures that local governments are required to follow.[331]

Although other measures are available to gauge the extent to which the responsibility for CEQA implementation has shifted to the state level, the simplest method is to examine the volume of the regulations implementing the Act. The first set of draft "Guidelines for the Preparation and Evaluation of Environmental Impact Statements" under CEQA, issued by the Secretary for Resources on June 21, 1971, totalled slightly over ten pages of single-spaced text.[332] The Guidelines were directed only at state agencies; no provisions were made for local agency implementation.[333]

By contrast, the State EIR Guidelines adopted by the Secretary for Resources and effective August 1, 1983 are 198 pages long, including the commentary to each guideline.[334] These Guidelines, of course, are fully applicable to local governments as well as to state agencies.[335]

The Guidelines are the most important factor in the increasing state dictation of CEQA implementation procedures. However, a number of

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in that jurisdiction. *Id.* § 65300 (West 1983). Both subdivision approvals and zoning must be consistent with that plan. *Id.* §§ 66473.5, 65860 (West 1977 & Supp. 1984); *see* Save El Toro Ass'n v. Days, 72 Cal. App. 3d 63, 140 Cal. Rptr. 59 (1977) (general plan must contain all required elements to be legally sufficient); 67 Op. Cal. Att'y Gen. 75 (1984) (discussing the "diagram" that must be included in the general plan).

[329] *See* CAL. PUB. RES. CODE §§ 30000-31406 (West 1977 & Supp. 1984) (California Coastal Act of 1976). The Act calls for the preparation of local coastal programs that are to be approved by the State Coastal Commission. *See id.* §§ 30510-30525.

[330] *See* CAL. GOV'T CODE §§ 66780-66784.4 (West 1983) (providing for County Solid Waste Management Plans).

[331] For a discussion of the constraints placed on local government in the housing area, see Stone, *A Legislative Mandate for More Housing*, L.A. LAW, July-Aug. 1983, at 34, 34 (legislature has "proceeded from expressing little more than an awareness of a problem to imposing requirements that cities plan for regional housing needs and justify planning decisions which limit housing opportunities."); *see also* Beckman & Prairie, *A Guide to Obtaining Required Regulatory Approvals for New Industrial Facilities in California*, 17 SAN DIEGO L. REV. 979 (1980).

[332] OFFICE OF THE SECRETARY FOR RESOURCES, PROPOSED GUIDELINES FOR THE PREPARATION AND EVALUATION OF ENVIRONMENTAL IMPACT STATEMENTS UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT OF 1970 (June 21, 1971).

[333] *Id.*; *see also* T. TRYZNA & A. JOKELA, *supra* note 11, at 21.

[334] *See* SECRETARY FOR RESOURCES, TEXT OF ADOPTED AMENDMENTS WITH STATEMENT OF REASONS (1983).

[335] CAL. ADMIN. CODE tit. 14, § 15000 (1983).

other factors have reinforced the state presence in the area. In addition to publication of the Guidelines, the Resources Agency has also published the California EIR Monitor.[336] This publication, which until recently provided notice of the availability of environmental documents from throughout the state, has included expert commentary from the editor on both environmental problems encountered in the implementation of CEQA and on judicial decisions.[337] One county official termed the EIR Monitor "the single most valuable statewide publication on environmental activities,"[338] and it has unquestionably served as a device to secure uniformity of implementation at the local government level. Other significant state influences on the development of CEQA have been the advisory role of the Office of Planning and Research through the State Clearinghouse[339] and enforcement actions brought by the California Attorney General.[340]

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[336] 1-11 CALIFORNIA EIR MONITOR (1974 to Pres.).

[337] *See, e.g.*, Bass, *Preparing Joint Federal/State Environmental Documents*, CAL. EIR MONITOR, Apr. 28, 1981, at 1; *Senate Bill 2011 on Mitigation*, CAL. EIR MONITOR, Dec. 17, 1982, at 1; *Recent Court Decisions Dealing With CEQA*, CAL. EIR MONITOR, Dec. 4, 1981, at 1. The case summaries and articles by the editor are notable for the high quality of their legal analysis.

[338] Letter from Randall L. Abbott, Planning Director, County of Kern, to the Resources Agency (Sept. 10, 1982) ("The Resources Agency should be required to publish the EIR Monitor. It is the single most valuable statewide publication on environmental activities . . . .").

[339] Guideline § 15023(c) requires OPR to administer the State Clearinghouse. OPR also published the "Land Use Litigation Newsletter" on a monthly basis starting in June 1980. This publication summarized recent litigation in the land use, environmental, and local government fields, and contained other local government planning news. Finally, in addition to publishing copies of CEQA and its Guidelines, OPR also made available legislative summaries of pending bills. *See, e.g.*, OFFICE OF PLANNING AND RESEARCH, LEGISLATIVE SUMMARY 1982 (Dec. 1982).

[340] Cases in which the Attorney General appeared as amicus in support of plaintiffs include: Horn v. County of Ventura, 24 Cal. 3d 605, 596 P.2d 1134, 156 Cal. Rptr. 718 (1979); Bozung v. Local Agency Formation Comm'n, 13 Cal. 3d 263, 529 P.2d 1017, 118 Cal Rptr. 249 (1975); No Oil, Inc. v. City Council, 13 Cal. 3d 68, 529 P.2d 66, 118 Cal. Rptr 34 (1974); Friends of Mammoth v. Board of Supervisors, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972); Friends of "B" St. v. City of Hayward, 106 Cal. App. 3d 988, 165 Cal. Rptr. 514 (1980); City of Santa Ana v. City of Garden Grove, 100 Cal. App. 3d 521, 160 Cal. Rptr. 907 (1979); Whitman v. Board of Supervisors, 88 Cal. App. 3d 397, 151 Cal. Rptr. 866 (1979); Shawn v. Golden Gate Bridge Dist., 60 Cal. App. 3d 699, 131 Cal. Rptr. 867 (1976); Day v. Glendale, 51 Cal. App. 3d 817, 124 Cal. Rptr. 569 (1975); Burger v. County of Mendocino, 45 Cal. App. 3d 322, 119 Cal. Rptr. 568 (1975). Actions brought by the Attorney General resulting in reported decisions include People *ex rel.* Younger v. Local Agency Formation Comm'n, 81 Cal. App. 3d 464, 146 Cal. Rptr. 400 (1978) and

The passage of CEQA in itself affected local autonomy to some degree since before its enactment cities and counties generally were not obligated to examine the environmental impact of their actions. Even after the *Friends of Mammoth* decision,[341] however, the extent of local government's discretion to implement the Act remained uncertain. That would depend largely on the scope and enforceability of the state-prepared CEQA Guidelines.

B. The Guidelines as Regulatory Mandates or Flexible Aids

The provisions of CEQA ensure that the state plays some role in its implementation. Public Resources Code section 21083 directs the Office of Planning and Research to prepare and develop guidelines to implement the Act.[342] These Guidelines must include criteria for determining whether a proposed project has a "significant effect on the environment" and must require that a finding of significant effect be made in several instances. The Guidelines are to be transmitted to the Secretary for Resources, who is to adopt them using certain procedures for the adoption of regulations established in the Government Code.[343]

Although the statutory provision for adopting Guidelines at the state level to aid both state and local decisions is, in itself, a significant shift in power, the true reach of the Guidelines depends upon the weight accorded to the specific provisions. Although section 21083 mandates use of the same procedures for adopting the Guidelines that are used for all state regulations,[344] the fact that these implementation procedures are termed guidelines raises a question about their binding effect on local governments. Judicial treatment of the Guidelines has given

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People v. County of Kern, 62 Cal. App. 3d 761, 133 Cal. Rptr. 389 (1976).

[341] *See supra* text accompanying notes 52-57.

[342] CAL. PUB. RES. CODE § 21083 (West Supp. 1984) reads in pertinent part:

> The Office of Planning and Research shall prepare and develop proposed guidelines for the implementation of this division by public agencies. The guidelines shall include objectives and criteria for the orderly evaluation of projects and the preparation of environmental impact reports and negative declarations in a manner consistent with this division.
>
> . . .
>
> The Office of Planning and Research shall develop and prepare the proposed guidelines as soon as possible and shall transmit them immediately to the Secretary of the Resources Agency. The Secretary of the Resources Agency shall certify and adopt the guidelines pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code . . . ."

[343] *Id.*

[344] *Id.*

them the equivalent effect of regulations, endorsing the increasing shift in implementation power to the state level.

The leading case is *City of Santa Ana v. City of Garden Grove*,[345] in which the principal issue before the court was whether a general plan amendment constituted a project under CEQA. In deciding that question in the affirmative, the court upheld a CEQA Guideline stating that a general plan amendment was a project. The court declared that section 21083 empowered the Resources Agency to adopt the State EIR Guidelines as regulations. Most importantly, however, it also found that "the contemporaneous construction of a statute by an administrative agency charged with its administration and interpretation, while not necessarily controlling, is entitled to great weight and should be respected by the courts unless it is clearly erroneous or unauthorized."[346]

The implications of this opinion with respect to the state's role in CEQA implementation are profound. The court concluded that, notwithstanding the use of the term "guidelines" by the legislature, the CEQA Guidelines would be viewed much the same as other regulations adopted by administrative agencies. Accordingly, since CEQA was not altogether clear about both its scope as well as its methods, the interpretation of questions over CEQA's applicability that are found in the Guidelines likely would be conclusive. Since those interpretations were made at the state level, the *Santa Ana* court effectively endorsed a shift in power to that level.

Santa Ana was not the only decision to address the deference to be accorded the Guidelines. A second decision issued by a different division of the court of appeal less than two weeks after *Santa Ana* took a less deferential approach to the Guidelines. In *Karlson v. City of Camarillo*,[347] the court stressed that the legislative choice of the word "guidelines" was "very carefully selected" and termed the Guidelines "indications or outlines to be followed, allowing for flexibility of action and conduct of governmental agencies faced with what are frequently complex and difficult decisions which could affect the environment."[348] The opinion also declared that "the courts have followed the general tenor of the Guidelines, indicating that they are subject to a construc-

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[345] 100 Cal. App. 3d 521, 160 Cal. Rptr. 907 (1979).

[346] *Id.* at 530, 160 Cal. Rptr. at 911. The court found this "is true particularly where there has been continued public reliance upon and acquiescence in such interpretations." *Id.* at 530, 160 Cal. Rptr. at 912.

[347] 100 Cal. App. 3d 789, 161 Cal. Rptr. 260 (1980).

[348] *Id.* at 804-05, 161 Cal. Rptr. at 269.

tion of reasonableness and the court will not seek to impose unreasonable extremes or to inject itself within the area of discretion as to the choice of action to be taken."[349]

While not directly contradicting *Santa Ana*, *Karlson* nonetheless chose to emphasize the discretion remaining available to local agencies even though the CEQA Guidelines to a large extent prescribe detailed procedures local agencies are to follow. Despite this contrast in approaches, a third appellate decision purported to find the views of the Guidelines in *Karlson* and *Santa Ana* consistent. In *Rural Land Owners Association v. City Council*,[350] the court first observed that the Guidelines were subject to a construction of reasonableness, citing the *Karlson* decision. It then cited *Santa Ana* in the same paragraph for the proposition that "[w]hile the Guidelines allow for flexibility of action within their outlines, they are not to be ignored. They are entitled to great weight and should be respected by the courts unless they are clearly erroneous or unauthorized."[351]

In fact, the two views of the Guidelines are not precisely the same. The divergence can be traced back to the reasoning of the *Karlson* opinion, in which the court cited a previous case, *Residents Ad Hoc Stadium Committee v. Board of Trustees*,[352] for the principle that the Guidelines are subject to a construction of reasonableness. However, the reference in the *Residents* case to a construction of reasonableness was with respect to the content required of the EIR, not the weight to be given the Guidelines. The *Residents* court was simply summarizing the "rule of reason" concept regarding what is required in an EIR,[353] not passing judgment on the effect of the Guidelines. The *Karlson* court took that language and applied it out of context.

Most of the decisions that have considered interpretations of CEQA found in the Guidelines have given those interpretations the "significant weight" called for by the *Santa Ana* decision.[354] This has been particularly true in cases involving the public review process, where the

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[349] *Id.* at 805, 161 Cal. Rptr. at 269.

[350] 143 Cal. App. 3d 1013, 1021, 192 Cal. Rptr. 325, 330 (1983).

[351] *Id.* at 1022, 192 Cal. Rptr. at 330.

[352] 89 Cal. App. 3d 274, 152 Cal. Rptr. 585 (1979).

[353] *See supra* text accompanying note 165.

[354] *See, e.g.*, Guardians of Turlock's Integrity v. Turlock City Council, 149 Cal. App. 3d 584, 594-95, 197 Cal. Rptr. 303, 309-10 (1984) (applying provisions in Guidelines that require a project be submitted for statewide review); Brentwood Ass'n for No Drilling, Inc. v. City of Los Angeles, 134 Cal. App. 3d 471, 504, 184 Cal. Rptr. 664, 671 (1982) (citing former guideline § 15084(b) as support for its conclusion that appellants "overstate the effect of the substantial evidence test.").

Guidelines have ensured that comments by the public are solicited and thoroughly considered by public agencies. As a result, the early laissez faire approach to CEQA[355] is no longer followed.

This development generally has not been viewed as an unwelcome one, nor should it be. Several factors support the need for a uniform set of rules for public agencies to follow in implementing CEQA, a need that only guidelines adopted at the state level can fulfill. First, CEQA applies to both large and small local governments. Many of the smaller local governments lack both the personnel and time to develop the expertise needed to administer such an increasingly complex law. Quite naturally, they look to the state for guidance, and the Guidelines provide it. Second, the Act's "degree of difficulty" factor is made greater by the need to take court decisions into account. The State EIR Guidelines provide needed legal expertise to institutionalize a response to numerous appellate decisions.[356]

Finally, the need for certainty among the regulated community is an important concern. The Guidelines help ensure that an identical project proposal will be treated with at least some degree of uniformity no matter where the application is filed. Without the Guidelines, the specter exists that the CEQA process throughout the state would become balkanized to a crippling degree.

In summary, the administration of CEQA is now largely dictated by state regulations. While Public Resources Code section 21082 still requires that local governments adopt "objectives, criteria and procedures" for the evaluation of projects pursuant to CEQA,[357] those criteria must be consistent with the State EIR Guidelines.[358] In fact, the Guidelines themselves suggest that the local government may wish simply to adopt the State EIR Guidelines by reference, together with only those additional procedures necessary to take into account local condi-

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[355] T. TRYZNA & A. JOKELA, *supra* note 11, at 55.

[356] The Guidelines have been amended frequently, partly to account for new court decisions. *See, e.g., Proposed Change in the Regulations of the Resources Agency Dealing with the California Environmental Quality Act*, CAL. EIR MONITOR, June 18, 1981, at 1. The proposed amendment to § 15037(b)(5) was intended to take into account a recent court decision. *Id.* at 6.

[357] CAL. PUB. RES. CODE § 21082 (West 1977); *see also* Starbird v. County of San Benito, 122 Cal. App. 3d 657, 661, 176 Cal. Rptr. 149, 151 (1981) (county had adopted guidelines pursuant to § 21082, which "became rules which must be followed"); Bass, *Adopting and Amending Local CEQA Procedures*, CAL. EIR MONITOR, Aug. 13, 1982, at 1.

[358] CAL. PUB. RES. CODE § 21082 (West 1977) ("The objectives, criteria, and procedures shall be consistent with the provisions of this division and with the guidelines adopted by the Secretary of the Resources Agency pursuant to Section 21083.").

tions.[359] As a result, the discretion available to local governments in implementing the Act is quite limited.

C. The Problem of Complexity

The disadvantage to the increasing influence of the state-prepared Guidelines is their complexity. The current level of technical detail in the Guidelines is obvious upon even a cursory reading. For example, over thirty-eight definitions of various words and phrases that are used in the Guidelines are given.[360] Even the courts have taken note of "the complicated nature of CEQA and its Guidelines."[361]

The explanation for the enlargement of the Guidelines lies in part with the courts. Responding to litigation initiated under CEQA, the courts have issued a significant body of appellate decisions construing the Act. The Guidelines have expanded to integrate these decisions as they have been handed down. Further, the legislature sometimes has responded to judicial opinions by passing amendments to the Act that the Guidelines must then take into account.

However, other factors underlying the expansion of the Guidelines are only tenuously related to CEQA litigation. Most important has been the difficulties encountered by local government in the day-to-day implementation of CEQA.[362] As implementation problems reached the

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[359] CAL. ADMIN. CODE tit. 14, § 15022 (1983).

[360] *Id.* §§ 15350-15387.

[361] Whitman v. Board of Supervisors, 88 Cal. App. 3d 397, 418, 151 Cal. Rptr. 866, 878 (1979).

[362] For example, during the 1980-83 period the following bills amending CEQA have become law: (1) 1983: Assembly Bill 713 (CEQA exemption for Olympic games), Assembly Bill 1462 (negative declarations), Assembly Bill 1488 (time limits for approvals), Assembly Bill 1701 (exemption for ports and prisons), Assembly Bill 1703 (copies of EIR's for legislators), Assembly Bill 1829 (tiering of EIR's), Senate Bill 224 (time period reduction for notice of preparation review from 45 to 30 days), Senate Bill 413 (extension of time limits for approval after EIR prepared), Senate Bill 417 (exemption of second rental unit ("granny flats") ordinances from CEQA), Senate Bill 422 (prison exemption), Senate Bill 878 (waste discharge exemption for dairy farms); (2) 1982: Assembly Bill 411 (exemption for response to a reduction in federal funds), Assembly Bill 952 (archaeological standards for CEQA mitigation), Assembly Bill 1387 (reduction of housing units as mitigation measure), Assembly Bill 1858 (community plans and CEQA compliance), Assembly Bill 3089 (exemption for land boundary settlements), Assembly Bill 3647 (exemptions for passenger rail service), Senate Bill 549 (exemption for grade separation projects and applicability of CEQA to certain actions of air pollution control districts), Senate Bill 1534 (exemption for second residential units), Senate Bill 2011 (mitigation power); (3) 1981: Assembly Bill 710 (application of CEQA to air quality management district and submission of comments to public agency), Assembly Bill 1076 (exemption for local agency action under functional

attention of the Office of Planning and Research, the Guidelines were amended to solve them on a comprehensive, statewide basis.

Another important factor is the nature of CEQA as a prophylactic measure intended to apply to a wide variety of government actions. CEQA was designed to overlay previously existing statutory authorizations for local and state government actions. These statutory provisions in some instances have their own specific timetables and procedures. Consequently, an administrative accommodation between CEQA and these laws can become necessary, and this task has fallen to the Guidelines.[363]

One important step in improving the process has taken place recently: a comprehensive revision in the Guidelines was completed in 1983. In clarity and organization, the new version of the Guidelines goes a long way toward increasing their usefulness, and local governments were almost unanimous in hailing the decision to undertake the revision.[364] Perhaps, as was apparently the case with NEPA, the new

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equivalent program), Assembly Bill 1185 (use of EIR's with residential projects), Assembly Bill 1628 (limitation on exactions from developer), Assembly Bill 1915 (attorneys fees to public agency defending suit), Senate Bill 803 (further defining "significant effect on the environment"); and (4) 1980: Assembly Bill 2147 (public notice, conditional permits, 90-day time limit for requesting hearing), Assembly Bill 1023 ("Spruce Goose" boat exemption), Assembly Bill 2153 (housing exemptions), Assembly Bill 3175 (technical numbering changes), Senate Bill 1448 (exemption for general plan extensions), and Senate Bill 1718 (mass transit exemptions).

[363] *See, e.g.*, Letter from Barry Steiner, Deputy County Counsel, County of Sacramento, to Norman E. Hill, Assistant Secretary for Resources (Sept. 8, 1982):

> Guidance would be extremely helpful on the appropriate time to prepare CEQA documents when an assessment district is being formed. Given today's difficulty in financing infrastructure, assessment districts are increasingly being used as a funding technique. Meshing numerous assessment district laws with CEQA is extremely complicated, and guidance from the Resources Agency is necessary.

[364] A large number of letters commenting on the draft Guidelines emphasized their improvement over the previous Guidelines. *See, e.g.*, Letter from Bruce Beyaert, Manager, Env. Planning, Chevron U.S.A., Inc., to Norman E. Hill, Assistant Secretary for Resources (Sept. 9, 1982) ("The proposed State CEQA Guidelines are a vast improvement over the previous version. The reorganization of existing language and addition of text to explain and implement recent court and legislative actions provide guidance which should aid virtually all future users of the Guidelines."); Letter from Milton Feldstein, Air Pollution Control Officer, Bay Area Air Quality Mgt. Dist., to Norman E. Hill, Assistant Secretary for Resources (Sept. 28, 1982) ("an excellent job of reorganizing and clarifying the regulations for this complex subject area, to the benefit of concerned agencies and the general public"); Letter from Brent Harrington, Planning Director, County of Calaveras, to Norman E. Hill, Assistant Secretary for Resources (Sept. 14, 1982) ("[W]ith few exceptions the revised regulations are a significant step

regulations will alleviate part of the complexity problem.

CONCLUSION

The impact of judicial decisions on the development of CEQA has been substantial. Over the past fifteen years, the courts have delineated the parameters of an Act notable for containing a host of vague terms. In doing so, the courts have inclined toward requiring agencies to complete the full administrative process established by the Act and have emphasized the role of public participation. At the same time, the decisions generally do not reveal a tendency toward judicial activism with respect to either the discussions of environmental impacts required in an EIR or the substantive effect of the Act.

Barring fundamental changes in CEQA's provisions, the past indicates that the judiciary will continue to play a significant role in overseeing CEQA administration by governmental agencies. Because many of the larger issues under CEQA have already received judicial attention during its fifteen-year history, the future should bring continued refinements of earlier themes rather than sweeping new decisions. We can also expect continuing controversy of some sort. The prophylactic nature of the Act, the fact that government agencies periodically face the threat of litigation, and the delays an applicant faces while awaiting the outcome of the process ensure that this state-mandated intrusion on local discretion will never be wholeheartedly accepted.

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forward in the improvement and maturation of the CEQA process. We find the regulations to be well organized, logical and relatively easy to work with . . . ."); Letter from Barbara Henirich, City of San Mateo, to the Resources Agency of California (Sept. 16, 1982) ("The reorganized format appears to be successful in making the guidelines both easier to understand and to use in a logical sequence of steps."). One reason for the apparent acceptance of the Guidelines may be the process by which they were adopted. "In preparing the new Guidelines, the Resources [A]gency and OPR made an effort to accommodate the hundreds of comments submitted during the public review process. The final product represents a consensus, or at least a compromise, on many important issues." Bass, *supra* note 11, at 4. Another important factor is that while the Guidelines revisions were drafted during the Brown Administration, they were adopted after Governor Deukmejian had taken office and received careful scrutiny from the new Administration. *Id.* The praise of the revisions was not, however, absolute. "While the proposed changes certainly rearrange the environmental guidelines, they fall short of accomplishing the needed revisions and streamlining for providing proper guidance for processing projects under CEQA." Letter from Gerald J. Jamriska, Director of Planning, City of Glendale, to Norman E. Hill, Assistant Secretary for Resources (Sept. 16, 1982). The comment continues by noting that the emphasis was placed "on answering questions and providing more clarity" rather than "addressing and correcting the numerous deficiencies which exist in the guidelines." *Id.*