

Comments on the California Rule-Making Process and the Effects Thereon of the California Environmental Quality Act of 1970

Government governs the use of most physical resources, both the natural and the man-made components of our environment. The governing is largely by administrative agencies, for the same basic reasons that originally led to the creation of the administrative process, "the rise of industrialism and the rise of democracy." The complexity of the problems of regulation of the one or the other, by agencies of the latter, resulted in the first administrative tribunal, the Interstate Commerce Commission. Eighty-three years' history has moved most of such control by democracy to administrative agencies. The problem, therefore, of the restoration and maintenance of a liveable environment is, to a large extent, the problem of the control of administrative agencies...

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The purpose of this paper is to explore the rule-making or quasi-legislative part of California's administrative process, to analyze California's Environmental Quality Act of 1970 (EQA)² and to determine what effect the latter has or should have on the former. In doing this, it will be shown that the Environmental Quality Act gives ordinary citizens, or citizen's groups,

¹Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612, 614-5 (1970) (hereinafter cited as Sive).

²CAL. PUB. RES. CODE § 21000 *et seq.* (West Supp. 1971).

the right to participate in the administrative process of California State agencies³ when an environmental interest is at stake and imposes a duty upon these agencies to give major consideration to environmental effects when making rules or regulations, setting standards or issuing orders which could have a significant impact on the environment. This paper does not attempt nor purport to present a general discussion of the law of standing as pertains to the Federal or the California administrative process nor does it discuss in any matter the law of standing in regard to the adjudicatory or quasi-judicial stage of the administrative process.⁴

I. THE ADMINISTRATIVE PROCESS

Governmental control and power is exercised primarily through administrative agencies or through the administrative process. Legislatures enact laws and governmental agencies enforce and carry out these laws by adopting and enforcing regulations which implement, interpret or otherwise carry out the provisions of the laws. As such, the agencies act as a buffer between the people's elected representatives and the people, who theoretically have ultimate power and control over both the agencies and the elected representatives.

The administrative process is traditionally broken down into two stages for the purposes of analysis and for the purposes of procedural requirements placed on agencies. These are the rule making or quasi-legislative stage and the adjudicatory or quasi-judicial stage.⁵ Rules, regulations, orders, standards, and specifications⁶ of general application that apply to the populace as a whole are products of the quasi-legislative process or that stage of the administrative process which resembles a legislature's

³For an excellent and exhaustive listing of California State Agency activities which have an affect on environmental protection and improvement see BRECHER AND NESTLE, *ENVIRONMENTAL LAW HANDBOOK* 161-174 (California Continuing Education of the Bar, 1971). For a partial listing of federal agencies which administer natural resources see Sive, *supra* note 1, at 615 n. 11.

⁴For a general and exhaustive discussion of standing, see 3 DAVIS, *ADMINISTRATIVE LAW TREATISE* § § 22.01 - 22.18 (1958).

⁵Compare CAL. GOV'T. CODE § § 11371-11445 (West 1966) with CAL. GOV'T. CODE § § 11500-11528 (West 1966). The former pertains to rules and regulations and the latter to administrative adjudications.

⁶Hereinafter the term regulation will be used to refer collectively to rules, regulations, orders, standards, specifications, *etc.* unless otherwise specified.

enactment of a statute.⁷ The proceedings at this stage are similar to those of legislative committees which hear testimony and evidence of contending factions and witnesses. Cross-examination or rebuttal among contenders is not required and independent investigations such as staff studies can be received into evidence and taken under consideration.⁸ The quasi-judicial or adjudicatory stage is that part of the administrative process which resembles a court's decision of a case in that it determines rights and operates concretely, as opposed to generally, upon individuals in their individual capacity.⁹ It consists mainly of licensing and disciplining members of the various professions and occupations¹⁰ and of determining what the law is and what the rights of the parties are under the law with reference to transactions already had.¹¹

The focus of this paper will be limited to the quasi-legislative or rule-making stage of the administrative process since it is at this stage that regulations are formulated and promulgated, and since it is by means of these regulations that agencies exercise their general control. It is also at this stage that California's Environmental Quality Act will or should have its primary impact upon the administrative process. The EQA requires all agencies to give major consideration to environmental effects,¹² and the most appropriate time to give consideration to environmental effects is when agencies are adopting regulations which determine the manner in which their power and control is to be exercised. Also, the EQA requires agencies to compile environmental impact reports on any proposed action which could have a significant impact on the environment.¹³ This means that such a report would have to be submitted and considered during the quasi-legislative process before any regulation¹⁴ which could

⁷1 DAVIS, ADMINISTRATIVE LAW TREATISE § 5.01, 285 (1958).

⁸Rivera v. Division of Industrial Welfare, 265 Cal. App. 2d 576, 587, 71 Cal. Rptr. 739, 750 (1968).

⁹1 DAVIS, ADMINISTRATIVE LAW TREATISE § 5.01, 285-6 (1958).

¹⁰Brock v. Superior Court, 109 Cal. App. 2d 594, 599, 241 P.2d 283, 287 (1952).

¹¹Wilson v. Hidden Valley Municipal Water District, 256 Cal. App. 2d 271, 280, 63 Cal. Rptr. 889, 894 (1967).

¹²CAL. PUB. RES. CODE § § 21000(g), 21001(d) and (g) (West Supp. 1971).

¹³*Id.* § § 21100-21107.

¹⁴It is to be emphasized that the term "regulation" as used throughout this paper refers collectively to rules, regulations, orders, standards, specifications, etc. See note 6, *supra*.

have a significant impact on the environment could be adopted and promulgated.

CALIFORNIA QUASI-LEGISLATIVE PROCESS

The California Administrative Procedures Act (APA)¹⁵ sets out in detail the procedure which is to be followed by agencies when adopting regulations of general application.¹⁶ In particular, it provides basic statutory minimum procedural requirements which place a duty upon an agency to publish and mail notice of its proposed action, to provide a full public hearing, to give all interested persons an opportunity to present their statements or arguments in writing and to give consideration to all relevant matters presented to it.¹⁷

If an agency plans to adopt, amend or repeal a regulation, the act requires that 30 days prior notice of such action be given. This 30 day notice must be published in a newspaper of general circulation, filed with the rules committee of each house of the legislature and mailed to every person who has filed a request for notice with the agency.¹⁸ The required notice is to include a

¹⁵CAL. GOV'T. CODE § 11370 *et seq.* (West 1966).

¹⁶*Id.* § § 11371-11445.

¹⁷California Ass'n. of Nursing Homes v. Williams, 4 Cal. App. 3d 800, 807, 84 Cal. Rptr. 590, 594 (1970); CAL. GOV'T. CODE § § 11420-11427 (West 1966). The minimum requirements do not apply to forms prescribed by agencies, to any instructions relating to the use of the forms nor to any regulation which relates only to the internal management of the agency. *Id.* § 11371(b). The requirements also do not apply to emergency regulations although there are other specific requirements that must be met before a regulation can be promulgated as an emergency regulation and certain provisions which apply after a regulation is adopted as an emergency regulation. *Id.* § § 11420, 11421, 11422, 11422.1, and 11440. Lastly, the requirements do not apply to regulations which (1) establish or fix prices, (2) relate to the use of public facilities under the jurisdiction of any state agency when the effect of such regulations is indicated to the public by means of signs or signals or (3) are directed to a specifically named person or group of persons and do not apply generally throughout the state, *Id.* § § 11380 and 11421. The APA applies to quasi-legislative proceedings of all agencies except the Public Utilities Commission and the Industrial Accident Commission. *Id.* § 11445. The statute which confers power upon a particular agency may impose additional requirements upon that agency, but otherwise the particular minimum procedural requirements set forth in the Act must be followed in the exercise of any quasi-legislative power conferred by statute. *Id.* § 11420.

¹⁸*Id.* § 11423. When an agency feels it to be appropriate it may mail notice to any person or groups of persons whom it believes to be interested in the proposed action.

statement of the time, place and nature of the proceedings and the express terms, or an informative summary, of the proposed action.¹⁹ Most importantly, on the date and at the time and place designated in the notice, the agency must hold a public hearing and afford any interested person an opportunity to present arguments, statements or contentions in writing, with or without the opportunity to present the same orally. Coupled with the latter, the agency is required to consider all relevant matter presented to it by any interested party when determining the regulation to be adopted.²⁰

Once a regulation is adopted or amended, any interested person may bring an action to obtain a judicial declaration as to the validity of the regulation.²¹ This means that a person who did not participate in the proceedings in which the regulation was adopted or amended can bring such an action providing he can show he has the requisite interest. A regulation may be declared invalid for substantial failure to comply with the provisions of the act or for any other reason that may exist.²²

An important provision of the APA is one which gives any interested person the right to petition an agency to request the adoption or repeal of a regulation except where such right is restricted by statute to a designated group. Within 30 days after receiving such a petition the agency must either schedule the matter for a public hearing or deny the petition in writing.²³ This means that a person with the requisite interest could at any time initiate action which, if he could show proper circumstances, might result in the adoption of a new regulation or the repeal or amendment of an existing regulation. Implicit in this provision is the requirement that the action of the agency in denying such a petition cannot be arbitrary, capricious or un-

¹⁹*Id.* § 11420.

²⁰*Id.* § 11425.

²¹*Id.* § 11440.

²²*Id.* Although there are no cases on point, failure to mail notice to a person who has requested such notice apparently does not constitute substantial failure to comply with the Act because section 11423 of the Government Code provides that such failure to mail does not invalidate any action taken by the agency. Even with this express provision, however, it would seem that this section should be read so that any willful or intentional failure to notify amounts to substantial failure to comply with the act.

²³*Id.* § § 11426 and 11427.

reasonable. This has particular significance if the Environmental Quality Act makes every citizen an interested person in regard to agency action or regulations which have or will have a significant effect on the environment, as will be discussed below. Other provisions of the Act deal with the mechanics and the requirements of filing and publication²⁴ and the effective date of regulations once adopted or amended.²⁵

INTERESTED PERSONS, RELEVANT MATTER AND HEARING RECORD

There are two terms contained in the provisions of the APA relating to the quasi-legislative process which are quite important for the purposes of the Environmental Quality Act and which therefore require some explanation. The one is the term "interested person" and the other is the term "relevant matter."

"INTERESTED PERSON"

Interested persons are given the right to present written arguments and statements at the public hearing held for the adoption, repeal or amendment of a regulation,²⁶ the right to petition an agency for the repeal or adoption of a regulation²⁷ and the right to obtain a judicial declaration as to the validity of a regulation.²⁸ But the term interested person has been construed rather narrowly by the courts so that the persons entitled to take advantage of the above provisions are somewhat limited.

In *Associated Boat Industries of Northern California v. Marshall*²⁹ a trade association, whose members were subject to certain regulations and who would have been proper "interested persons," brought an action under section 11440 of the Government Code to have the regulations declared invalid. The court held that the association itself did not have an interest which was proper to be determined in the action since it was not sub-

²⁴*Id.* § 11380-11415.

²⁵*Id.* § 11422.

²⁶*Id.* § 11425.

²⁷*Id.* § 11426 and 11427.

²⁸*Id.* § 11440.

²⁹104 Cal. App. 2d 21, 230 P.2d 379 (1951).

ject to the regulations sought to be attacked and could not be legally affected by their enforcement.³⁰ The term "interested person" was held to include only those who have a direct and not merely consequential legal interest in the proceedings before the agency.³¹

The California Supreme Court subsequently expanded the definition of "interested person" in *Chas.L. Harney, Inc. v. Contractor's Board*.³² There a regulation of the Contractor's Board required a specialty license in order to do certain types of work unless the work was part of a general contract for an overall job. The plaintiff was qualified to perform specialty work but was prohibited by the Board's regulations to bid for or contract to do the work unless he received a general contract for the entire job or obtained the appropriate specialty license. The plaintiff brought an action under Government Code section 11440 to have the regulation declared invalid. The trial court granted a judgement for the Board on the pleadings and held that the plaintiff had not presented a justiciable issue since he had not claimed he even desire to undertake any specialty contract. It held that the plaintiff had no "interest" affected by the regulation unless he desired to undertake or did enter into a specialty contract. The Supreme Court reversed the lower court's judgement and held that Harney was an interested person and was entitled to bring an action to test the validity of the regulation. The court reasoned that "the legislature, by enactment of section 11440, must have intended to permit persons affected by an administrative regulation to test its validity without having to enter into contracts with third persons in violation of its terms so as to subject themselves to prosecution or disciplinary proceedings."³³ In other words the plaintiff did not have to show a direct legal interest that was affected; he only had to show that he was "within the ambit of the statute implemented by the rule."

A person who has a contract right which is or may potentially be adversely affected by a regulation has also been held to be an

³⁰*Id.* at 23, 230 P.2d at 380.

³¹*Id.* at 22, 230 P.2d at 380; *Funeral Directors Ass'n. v. Board of Funeral Directors and Embalmers*, 67 Cal. App. 2d 311, 313, 154 P.2d 39, 40 (1944).

³²39 Cal. 2d 561, 247 P.2d 913 (1952).

³³*Id.* at 564-5, 247 P.2d at 915.

interested person under section 11440. In *Sperry and Hutchinson Co. v. California State Board of Pharmacy*,³⁴ the State Board of Pharmacy had adopted a regulation which prohibited the giving of trading stamps by pharmacists on purchases of prescription drugs. Plaintiff had contracts with over 900 pharmacists in the state by which the pharmacists were obligated to buy trading stamps from the plaintiff and to issue them in all purchases, including purchases of prescription drugs. Plaintiff brought an action under section 11440 attacking the validity of the regulation. The court held that the plaintiff was an interested person within the meaning of section 11440 and hence had standing to maintain the action. Plaintiff would have lost the benefit of its 900 contracts had the regulation been enforced.³⁵

Thus, as interpreted by the courts, one is an interested person under section 11440 if he has a legal interest affected directly or indirectly by the regulation or if he is a person potentially affected by it. Section 11440 is designed to allow a person potentially subject to an administrative regulation to determine whether or not the regulation is valid and need be followed before he commits himself to a course of action that might be in conflict with the regulations.³⁶ Persons who are not potentially affected by a regulation or who do not have a legal right directly or indirectly affected by it are not "interested persons" and have no standing under section 11440 to challenge the regulation in question.

One question which should be raised is whether the term "interested person" has the same meaning in the provisions which give such a person the right to submit written evidence at an administrative hearing³⁷ and the right to petition for a repeal, adoption or amendment of a regulation³⁸ as it has in section 11440. It would seem that the meaning of the term should be the same in all three sections, especially since there is nothing in the statute which would indicate otherwise, but there are good

³⁴241 Cal. App. 2d 229, 50 Cal. Rptr. 489 (1966).

³⁵*Id.* at 233, 50 Cal. Rptr. at 492.

³⁶*K. & W. Pharmacy, Inc. v. State Department of Social Welfare*, 275 Cal. App. 2d 139, 141, 79 Cal. Rptr. 598, 600 (1969).

³⁷CAL. GOV'T. CODE § 11425 (West 1966).

³⁸*Id.* § 11426.

reasons why a greater showing of interest should be required of one who is attempting to obtain a judicial declaration as to the validity of a regulation than of one who is merely attempting to have his views considered by the agency at a hearing being held to determine the nature of the regulation to be adopted. Likewise, there are reasons why one should not have to show as great an interest merely to have standing to petition an agency for the adoption or repeal of a regulation.

The term "interested person" has only been interpreted in regard to determining who can obtain judicial review of the validity of a regulation. The requirement that a person have a legal interest directly or indirectly affected by a regulation or be one potentially affected by it avoids putting the courts in the position of rendering advisory opinions.³⁹ Also, once a regulation is formally adopted and promulgated, in accordance with the provisions of the APA, it should not be subject to judicial attack at the mere whim of every disgruntled member of the public. But, the reasons which justify limiting the scope of the term "interested person" in regard to obtaining judicial review of the rule-making proceedings have no application when determining who can participate in the rule-making proceedings. A primary purpose of requiring a public hearing and of allowing participation by all interested persons in the rule-making proceedings is to enable the agency to educate itself as to the matter at hand before taking action on a regulation.⁴⁰ Even with the best of intentions, an overworked and undernourished staff cannot do a complete job of obtaining and supplying needed information in every case.⁴¹ Another purpose of the rule-making hearings and public participation is to prevent certain "interested persons" and/or the agency from choosing the issues and narrowing the scope of the proceedings so as to promulgate regulations favorable only to special interest groups and not to the public as a whole. The continuing presence of a broad range of representatives reinforces the agency against pressures from such special interest groups, especially from the regulated groups them-

³⁹See concurring opinion in *Chas. L. Harney, Inc. v. Contractor's Board*, 39 Cal. 2d 561, 565, 247 P.2d 913, 916 (1952).

⁴⁰*Pacific Coast European Conference v. United States*, 350 F.2d 197, 205 (9th Cir. 1965).

⁴¹Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721, 765 (1968).

selves.⁴² These purposes dictate that citizens should be encouraged to participate in proceedings in which regulations are being determined and adopted so that an agency will be more likely to consider all aspects and effects of a regulation and all possible alternatives in light of what the public interest requires.

Likewise, when a party petitions an agency for the amendment, adoption or repeal of a regulation, the agency has an opportunity to consider alternatives to its present regulations or the need for adopting additional regulations. If the proposal has no merit, the agency merely has to give the petitioner a written denial, which states the reasons for the denial.⁴³ But, if the proposal has merit, the agency can schedule the matter for public hearing,⁴⁴ and, in the latter instance, the public and the agency will perhaps have been benefited by the amendment or repeal of obsolete or ineffective regulations or the adoption of needed regulations. By giving a broad interpretation as to who are interested persons for the purpose of petitioning an agency for the adoption, amendment or repeal of regulations, the number of persons who would feel it necessary to attempt a judicial attack on the validity of promulgated regulations would be greatly reduced.

Lastly, if one has participated in the proceedings that lead to the adoption of the regulation, then he certainly should be considered an interested person for the purposes of obtaining judicial review under section 11440 unless he can show no possible interest, direct or consequential, that might be affected by the regulation.⁴⁵ If the latter were the case he would have had no standing to participate in the adoption proceedings since he could not be properly classified as an interested person.

Interestingly, the Federal Administrative Procedure Act, in regard to the rule-making function, only gives an "interested person" the right to petition for amendment, issuance or repeal

⁴²*Id.* at 765.

⁴³*See* CAL. GOV'T. CODE § 11426 (West 1966).

⁴⁴Within 30 days the agency must either deny the petition in writing or set the matter for public hearing. CAL. GOV'T. CODE § 11427 (West 1966). *See* text at note 23, *supra*.

⁴⁵*See* *Convent v. State Board of Equalization*, 29 Cal. 2d 125, 130, 173 P.2d 545, 547-548 (1946) and *compare* *Pitts v. Perluss*, 58 Cal. 2d 824, 828-29, 377 P.2d 83, 85, 27 Cal. Rptr. 19, 21-22 (1962).

of a regulation and the right to participate in the rule-making process by submitting written data, views or arguments.⁴⁶ He cannot obtain a judicial declaration as to the validity of a regulation unless he suffers a "legal wrong" because of agency action or is adversely affected or aggrieved by agency action within the meaning of a relevant statute.⁴⁷ Agency action includes the adoption and promulgation of a regulation.⁴⁸ In other words, a party cannot obtain a judicial declaration as to the validity of a regulation promulgated by a federal agency unless he meets the standing requirements that have been developed by the federal courts under the federal act.⁴⁹ The party must suffer an injury in fact from the operation of the regulation and the interest sought to be protected by the party must be arguably within the zone of interest protected or regulated by the statute before these requirements are met.⁵⁰ Thus, under the federal statute one can be an interested person for the purpose of participating in proceedings leading to the adoption of a regulation and, at the same time, not have the requisite "interest" to have standing to obtain a judicial declaration as to the validity of a regulation once adopted.

Considering the purpose of allowing public participation in rule-making proceedings and the reasons why the courts have construed the term "interested persons" narrowly in regard to allowing judicial review of a promulgated regulation, a good argument can be made that one can be a less interested person under sections 11425 and 11426 and under section 11440, if he has participated in the proceedings leading to the adoption of the regulation, than he has to be if his first action is regard to the regulation is an attempt to have it declared invalid under section 11440. If the language of the sections prohibits such an interpretation, then it would seem that they should be amended so as to obtain such a result. The above points are discussed further below in regard to the Environmental Quality Act.

⁴⁶5 U.S.C.A. § 553(c) and (e) (1967).

⁴⁷5 U.S.C.A. § 702 (1967).

⁴⁸5 U.S.C.A. § 551 (13) (1967).

⁴⁹*See Arnold Tours v. Camp*, 400, U.S. 45, 46 (1970); *Association of Data Processing Organizations, Inc. v. Camp*, 397 U.S. 150, 152-155 (1970); and *Barlow v. Collins*, 397 U.S. 159, 163-165 (1970).

⁵⁰*Association of Data Processing Organizations, Inc. v. Camp*, 397 U.S. 150, 152-153 (1970); *Barlow v. Collins*, 397 U.S. 159, 164-165 (1970).

Actually, liberalizing the interpretation of who is an interested person for the purpose of obtaining judicial review of promulgated regulations under section 11440 would not seem to cause either agencies or courts any undue difficulties. When a regulation is attacked in a judicial proceeding under section 11440, the court's review of the administrative process is limited to three kinds of inquiry: (1) whether the agency has the authority to adopt a regulation of the kind under scrutiny; (2) whether the regulation, or action in adopting it, is arbitrary, capricious or unreasonable and entirely lacking in evidentiary support; and (3) whether the agency has complied with the minimum statutory procedures. In addition, the person attacking the regulation has the burden of proving a ground for invalidating the regulation.⁵¹ As long as the agency has the authority to adopt the regulation the challenger has a rather formidable task and it is doubtful that anyone would attempt such a task unless he were truly an "interested person". And if the agency did not have authority to adopt the regulation then anyone should be allowed to attack it.

"RELEVANT MATTER AND THE HEARING RECORD"

Section 11425 of the Government Code obligates an agency to consider all relevant matter presented to it before adopting, amending or repealing any regulation. As will be shown in part II, this obligation is quite important in respect to environmental problems since the Environmental Quality Act now makes any information relating to environmental effects "relevant matter" when a proposed regulation could have a significant impact on the environment. The duty to consider all relevant matter is imposed so as to ensure that action in adopting, repealing or amending a regulation will be based on factual data and sound reasoning and not just the mere whims of the agency. If an agency neglects or refuses to consider all relevant matter presented to it by all interested persons, the regulation issuing from such proceedings is invalid.⁵² In other words, the agency

⁵¹Ralph's Grocery Co. v. Reimel, 69 Cal. 2d 172, 175, 444 P.2d 79, 82, 70 Cal. Rptr. 407, 410 (1968); Morris v. Williams, 67 Cal. 2d 733, 748-9, 433 P.2d 697, 707, 63 Cal. Rptr. 689, 699 (1967); Short Stop, Inc. v. Fielder, 17 Cal. App. 3d 435, 440, 95 Cal. Rptr. 102, 104-5 (1971); California Association of Nursing Homes v. Williams, 4 Cal. App. 3d 800, 810, 84 Cal. Rptr. 590, 596 (1970); 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 5.05, 314-15 (1958).

⁵²CAL. GOV'T. CODE § 11425 (West 1966).

cannot just seek out evidence which will support a regulation desired by it or some particular interest group. It must make a good faith effort to consider all the relevant information which is presented to it.⁵³ This does not mean that each member of the agency or board which is conducting the hearing and which is responsible for formulating and adopting the regulation must read every document which is submitted. The members only need to be informed of the contents of the relevant matter submitted and consider it when they make their decision.⁵⁴ Thus, the burden imposed on an agency by the duty to consider all relevant matter is not particularly onerous.

Implicit in the statutory duty to consider all relevant matter and the other minimum statutory requirements is a requirement to develop a hearing record which discloses the evidence upon which a regulation is based.⁵⁵ Without such an accumulation of evidence and a corresponding hearing record a court reviewing the validity of a regulation has no way of evaluating a charge of invalidity since there would be no identifiable body of evidence by which to measure the compliance of the regulation, and the proceedings from which it issued, with the statutory requirements.⁵⁶ A court must know what a regulation means and how it was arrived at before it can exercise its duty of declaring it valid or invalid.⁵⁷ Thus, without such a record judicial review would be thwarted, there would be a substantial failure to comply with the minimum requirements of the APA and any regulation issuing from such proceedings would be invalid.⁵⁸

There is an exception to an agency's obligation to consider and incorporate in its record all relevant information or matter considered in formulating the regulation. If certain evidentiary material deals with public conditions rather than private facts

⁵³*Vita-Pharmacals, Inc. v. Board of Pharmacy*, 110 Cal. App. 2d 826, 832, 243 P.2d 890, 894 (1952).

⁵⁴*Id.* at 831, 243 P.2d at 893 (1952).

⁵⁵*California Association of Nursing Homes v. Williams*, 4 Cal. App. 3d 800, 807, 84 Cal. Rptr. 590, 594 (1970). *See California Grape, etc., League v. Industrial Welfare Com.* 268 Cal. App. 2d 692, 710-711, 74 Cal. Rptr. 313, 324-325 (1969).

⁵⁶*California Association of Nursing Homes v. Williams*, 4 Cal. App. 3d 800, 811, 84 Cal. Rptr. 590, 594 (1970).

⁵⁷*Id.* at 815, 84 Cal. Rptr. at 601.

⁵⁸*Id.* at 816, 84 Cal. Rptr. at 601.

and is generally available to the public so that any party can acquire it and use it by analysis and research in advance of the hearing, fairness and the minimum procedure requirements do not require its display on the administrative record.⁵⁹ Statistical compilations and social and economic studies that are available through standard research sources such as libraries and public document depositories are examples of such evidentiary materials which do not need to be incorporated into the record.⁶⁰ But if the evidentiary material consists of private facts not generally available to the public or of a special investigation conducted for the purpose of the determination before the agency, it must be incorporated in the hearing record with an opportunity for refutation provided.⁶¹

II. CALIFORNIA'S ENVIRONMENTAL QUALITY ACT AND THE ADMINISTRATIVE PROCESS

In 1970 the California Legislature passed the California Environmental Quality Act (EQA) which established a broad state policy directed at developing and maintaining a high quality environment.⁶² There are many questions as to what effect the act was intended to have and will have, but the discussion here will only touch upon the effects or possible effects of the Act on state administrative agencies and the state quasi-legislative process.

GENERAL PROVISIONS OF THE ACT

The act makes all agencies that are charged with regulating

⁵⁹California Grape, etc., *League v. Industrial Welfare Commission*, 268 Cal. App. 2d 692, 710, 74 Cal. Rptr. 313, 324 (1969); *Rivera v. Division of Industrial Welfare*, 265 Cal. App. 2d 576, 589, 71 Cal. Rptr. 739, 752 (1968).

⁶⁰*Rivera v. Division of Industrial Welfare*, 265 Cal. App. 2d 576, 589, 71 Cal. Rptr. 739, 752 (1968).

⁶¹*Id.*

⁶²The Act is in many respects very similar to the National Environmental Policy Act passed by Congress in 1969. 42 U.S.C.A. § 4321 *et seq.* (Supp. 1971). A comprehensive analysis of the National Environmental Policy Act and its relation to the citizen's suit is presented by Hanks and Hanks, *An Environmental Bill of Rights: The Citizens Suit and the National Environmental Policy Act of 1969*, 24 RUTGER L. REV. 230 (1970) (hereinafter cited as Hanks and Hanks). See also Comment, *Panoramic View of National Environmental Policy Act*, 16 HOWARD L.J. 116 (1970).

⁶³CAL. PUB. RES. CODE § 21000(g) (West Supp. 1971).

activities of private individuals, corporations and public agencies responsible for regulating such activities so that major consideration is given to the prevention of environmental damage.⁶³ Coupled with this duty is a declaration of a state policy to develop and maintain a high quality environment and to take all action necessary for this purpose;⁶⁴ the long-term protection of the environment is to be the guiding criteria in all public decisions.⁶⁵ In addition to considering economic and technical factors and short-term benefits and costs, government agencies at all levels are specifically directed to consider qualitative and environment factors and long-term benefits and costs when proposing, planning, or taking action which has or could have a significant effect on the environment.⁶⁶ Standards and procedures necessary to protect environmental quality are to be developed and promulgated by all state agencies.⁶⁷

ENVIRONMENTAL IMPACT REPORTS

Coupled with the general and broad provisions of the Act are specific provisions which require all state agencies, boards and commissions to include in any report on any project they propose to carry out, which could have a significant impact on the environment, a detailed statement of the effects that the project will have on the environment or, as it is called by the statute, an "environmental impact report."⁶⁸ Such a report is also required from any state official who is responsible for any federal project proposed within the state.⁶⁹ Significantly, no request

⁶⁴*Id.* § 21001(a).

⁶⁵*Id.* § 21001(d).

⁶⁶*Id.* § 21001(g).

⁶⁷*Id.* § 21001(f).

⁶⁸Specifically the report is to set forth the following:

- (a) Environmental impact of the proposed action;
- (b) Any adverse economic effects which cannot be avoided if the proposed action is implemented;
- (c) Mitigation measures proposed to minimize the impact;
- (d) Alternatives to the proposed action;
- (e) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and
- (f) any irreversible environmental changes which would be involved should the proposed action be implemented.

CAL. PUB. RES. CODE § 21100 (West Supp. 1971).

⁶⁹CAL. PUB. RES. CODE § 21101 (West Supp. 1971).

nor authorization for funds, other than funds for planning, can be made unless accompanied by an environmental impact report.⁷⁰ This requirement ensures that no appropriation for a project can be requested or made unless full consideration is given to the effect that the project will have on the environment. A very important provision of the Act requires all local, county and municipal governmental agencies to make environmental impact reports on any project they intend to carry out which could have a significant impact on the environment. The legislative bodies of all cities and counties which have an officially adopted conservation element of a general plan are exempted from the latter requirement but in lieu thereof they must make a finding that any such project is in accord with the conservation element of the general plan.⁷¹ Local agencies are also obligated to submit environmental impact reports if they receive state or federal funds on a project-by-project basis for land acquisition or construction projects which may have a significant impact on the environment.⁷²

EFFECT ON THE ADMINISTRATIVE PROCESS

The Environmental Quality Act, as summarized above, has two principle features in regard to its effect on agencies which engage in or have control over activities which have or may have a significant effect on the environment. The first is the requirement that the long-term protection of the environment is to be the guiding and major consideration of agencies in their planning and decision making, and the second is the duty to make a detailed report which specifies the effect that a particular proposed project will have on the environment. If the provisions of the act are to be read literally, then state agencies are now charged with considering and taking affirmative action to protect and enhance the environment in whatever activity they might be engaged, be it building a new highway or dam, destroying downtown slums for urban renewal or the mere granting of a license or permit to an individual or corporation for the undertaking of a particular private activity. The duties placed upon agencies by the Act provide a legal and judicial foundation for

⁷⁰*Id.* § 21102.

⁷¹*Id.* § 21151.

⁷²*Id.* § 21150.

attacking any agency action or proposed action which is not based upon sound environmental principles.⁷³

Other than the general and specific duties placed upon administrative agencies, the EQA should have a substantial effect upon the rule-making phase of the administrative process. The Act should make every citizen an "interested person" for the purposes of the Administrative Procedures Act with the right to participate in rule-making proceedings⁷⁴ in which a significant environmental interest is at stake and with the right to obtain a judicial declaration as to the validity of a regulation which has a significant effect on the environment.⁷⁵ The EQA creates a specific duty on the part of every citizen to contribute to the preservation and the enhancement of the environment,⁷⁶ while, at the same time, it requires agencies at all levels to develop standards and procedures necessary to protect the environment⁷⁷ and to give major consideration to environmental protection in the conduct of their activities.⁷⁸ In addition, there is a declared state policy announced in the Act to preserve and protect the environment. The citizen's duty to contribute to the preservation and enhancement of the environment, coupled with the duties placed on all state governmental agencies and the declared state policy, should be interpreted as making each private citizen an "interested person" for the purposes of the APA in any rule-making proceeding in which an environmental interest is

⁷³Since man's main concern from the beginning of California's development has been the exploitation of resources to develop the economy, the bulk of the law and the weight of judicial precedent has tended to favor special interests.

California has developed laws, regulations, and administrative means to apply the conservation philosophy of wise use of our natural resources, such as fisheries, timber, water and minerals. Because of our functional, special purpose approach, however, only the most direct damaging of resources is controlled by statutes or regulations. The indirect consequences are seldom identified.

The development of goals and statutes to maintain environmental quality will provide the necessary legal and judicial foundation.

CALIFORNIA ASSEMBLY GENERAL RESEARCH COMMITTEE, REPORT OF ASSEMBLY SELECT COMMITTEE ON ENVIRONMENTAL QUALITY: ENVIRONMENTAL BILL OF RIGHTS 18 (1970). This report proposed the Environmental Quality Act. *Id.* at 47-48.

⁷⁴CAL. GOV'T. CODE §§ 11425 and 11426 (West 1966).

⁷⁵*Id.* § 11440.

⁷⁶CAL. PUB. RES. CODE § 21100(e) (West Supp. 1971).

⁷⁷*Id.* § 21001(f).

⁷⁸*Id.* § 21000(g).

at stake or could be significantly affected. Such an interpretation would be quite logical and reasonable since the legislature would not have placed such a duty upon the citizenry without anticipating that existing laws would be liberally construed so as to enable the fulfillment of this duty and since the EQA does not provide any specific method by which the obligations placed by it upon agencies are to be enforced. This interpretation would help solve the problem pointed out by the quote from David Sive which prefaces this paper. The problem of restoration and maintenance of a liveable environment is, to a large extent, the problem of controlling administrative agencies. Making all citizens interested persons for the purpose of participating in and challenging rule-making proceedings in which an environmental interest is at stake should contribute substantially to controlling administrative action affecting the environment. Thus, the limited interpretation that has been given to the term "interested person" by the courts⁷⁹ would be eliminated in regard to agency regulations which have or potentially have a significant effect on the environment. Along the same line and under the same rationale, the Environmental Quality Act should also give a private citizen the right to bring a statutory mandamus action⁸⁰ to compel an agency to consider environmental factors if the agency has failed to do so since the law now specifically requires major consideration to be given by all agencies to environmental protection.⁸¹

If a court were reluctant to give such a broad interpretation to the EQA and its impact on the rule-making process, the area of administrative rule-making involving environmental effects would be an appropriate area to make a distinction in the degree of interest that a person must show in order to bring an action for a judicial declaration as to the validity of a administrative regulation⁸² as compared to that interest a person must show in

⁷⁹*See* *Associated Boat Industries of Northern California v. Marshall*, 104 Cal. App. 2d 21, 22-23, 230 P.2d 239 (1951); *Chas. L. Harney v. Contractor's Board*, 39 Cal. 2d 561, 564, 247 P.2d 913, 915 (1952); and *Sperry and Hutchinson Co. v. California State Board of Pharmacy*, 241 Cal. App. 2d 229, 233, 50 Cal. Rptr. 489, 492 (1966).

⁸⁰CAL. CODE OF CIV. PROC. § 1085 (West 1955).

⁸¹CAL. PUB. RES. CODE § 21000(g) (West Supp. 1971).

⁸²CAL. GOV'T. CODE § 11440 (West 1966).

order to participate in the public hearing⁸³ or to petition for adoption, amendment or repeal of a regulation.⁸⁴ Everyone should be encouraged to participate in the administrative process when regulations effecting the environment are being formulated and adopted so as to insure that the agency is fully educated as to the problems involved and is aware of what the public interest requires. But, at the same time a regulation once adopted should not be subject to judicial attack at the caprice of every disgruntled citizen. In other words, a court could well hold that the EQA makes all citizens "interested persons" for the purpose of participating in the administrative process of adopting, amending or repealing regulations under sections 11425, 11426 and 11427 of the Government Code and for the purpose of bringing an action for a judicial declaration under section 11440 if there has been prior participation in proceedings under sections 11425, 11426, and 11427 by the plaintiff in regard to the regulation under attack. But, at the same time, the court could hold that the EQA does not make all citizens "interested persons" for the purpose of obtaining a judicial declaration as to the validity of a regulation under section 11440 if there has been no prior participation by the plaintiff. As was stated previously, if the courts should feel limited by the language of the APA and the judicial gloss put on section 11440, then the APA should be amended so that sections 11425, 11426 and 11427 are not as restrictive in their application as section 11440 has been interpreted to be.

Another major effect of the EQA on the quasi-legislative process is that it makes any environmental information "relevant matter"⁸⁵ for the purposes of the APA if the agency action or proposal being considered as a potential of having a significant effect on the environment. In other words, an agency now has the duty to consider evidence which relates to environmental impact⁸⁶ and, therefore, the additional duty to make such evidence a part of its administrative record since a reviewing court would have no way of determining whether the agency has complied with the former statutory duty unless such evidence is

⁸³*Id.* § 11425.

⁸⁴*Id.* § 11426.

⁸⁵*Id.* § 11425. See text accompanying notes 37-47, *supra*.

⁸⁶CAL. PUB. RES. CODE § 21000(g) (West Supp. 1971).

made part of its record.⁸⁷ This is the area where the environmental impact report will play a major role in the quasi-legislative process in respect to environmental matters. Not only is environmental information now relevant matter for the purposes of the APA, but agencies have the affirmative duty under the EQA to make an environmental impact report on any proposed regulation which might have a significant impact on the environment.⁸⁸ In such circumstances, the report itself will be relevant matter and will be required to be made part of the agency's record. This is of special significance when one considers the information which the EQA requires the report to contain.⁸⁹ The report is the crux of the EQA since the requirement that it be made and compiled attempts to ensure that an agency will make itself fully aware of and fully educated itself as to the environmental effects of a proposed regulation before it decides what content the regulation is to have. Of course, the latter statement is equally applicable to any agency action which could have a significant impact on the environment.

The case of *Faulkner v. California Toll Bridge Authority*⁹⁰ provides a good example of the effects the EQA would have. There the plaintiff claimed, inter alia, that the Toll Bridge Authority had abused its discretion by failing to consider or study water conservation problems when approving a proposed toll bridge across the northern part of San Francisco Bay. Plaintiff sought mandamus⁹¹ to compel such consideration. The Supreme Court held that no abuse of discretion was committed because the Toll Bridge Authority was not directed nor empowered to consider water conservation problems as such. Mandamus would only lie to compel the Toll Bridge Authority to do something which it was specifically enjoined by statute to do and would not issue to compel action which has merely committed to the Authority's discretion.⁹²

Under the EQA, the Toll Bridge Authority would have had the specific statutory duty to consider environmental effects,⁹³

⁸⁷California Association of Nursing Homes v. Williams, 4 Cal. App. 3d 800, 810-811, 84 Cal. Rptr. 590, 597-598 (1970).

⁸⁸See text accompanying notes 64-68, *supra*.

⁸⁹See note 64, *supra*.

⁹⁰40 Cal. 2d 317, 327, 253 P.2d 659, 665-6 (1953).

⁹¹Under CAL. CODE OF CIV. PROC. § 1085 (West 1955).

⁹²Faulkner v. Toll Bridge Authority, 40 Cal. 2d 317, 326, 253 P.2d 659, 665 (1953).

⁹³CAL. PUB. RES. CODE § § 21000(h) and 21001(f) and (g) (West Supp. 1971).

which would have included water conservation problems, and failure to so consider such problems would have been an abuse of discretion that would have authorized the reviewing court to invalidate the Authority's action for substantial failure to comply with the APA.⁹⁴ The Authority could also have been required to consider such problems by writ of mandate.⁹⁵ In addition, the Authority would have had the duty of making its consideration of the water conservation problem and the evidence received thereon and an environmental impact report a part of its administrative record so that the reviewing court would be able to determine whether or not the Authority had complied with its statutory duty.

III. SUMMARY

In summary, the EQA imposes a duty upon all agencies to give major consideration to environmental protection during the rule-making process if the proposed rule or action could have a significant impact or effect on the environment. It is both a statutory authorization giving all agencies jurisdiction to consider environmental effects, which in most cases probably lacking prior to the passage of the Act, and a mandate requiring such consideration. Most importantly, the EQA should make all citizens "interested persons" for the purpose of participating in rule-making proceedings and for petitioning for the adoption, amendment or repeal of regulations. It would also seem to give all citizens the right to bring a judicial attack on regulations which are promulgated in disregard of the requirements of the EQA providing the courts give a broad construction to the EQA and make no distinction between the degree of "interest" a citizen must show in order to bring a judicial attack on a promulgated regulation and that which he must show merely to participate in the rule-making proceedings from which the regulation issues. Lastly, the EQA makes all information on environmental effects and the environmental impact report "relevant matter", as that term is used in the APA, in regard to rule-making which could have a significant impact on the environment.

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⁹⁴CAL. GOV'T. CODE § 11440 (West 1966).

⁹⁵CAL. CODE OF CIV. PROC. § 1085 (West 1955).