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# The California Environmental Quality Act (CEQA) After Two Decades: Relevant Problems and Ideas for Necessary Reform

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# The California Environmental Quality Act (CEQA) After Two Decades: Relevant Problems and Ideas for Necessary Reform

> The nation behaves well if it treats the natural resources as assets which it must turn over to the next generation increased, and not impaired, in value.[1]
>
> —Theodore Roosevelt

## I. INTRODUCTION

Have states' legislatively enacted environmental policies adequately solved the environmental concerns of haphazard development? Consider the following case that recently passed through California's environmental policing system: The Environmental Coalition of Ventura County recently fought a proposed landfill at Weldon Canyon in Ventura County, California.[2] The group, intent on substantially delaying the project and, ultimately, eliminating it, utilized the complicated procedures of the California Environmental Quality Act (CEQA) to drown the landfill proposal in a sea of bureaucracy.[3] The Environmental Coalition demanded that an environmental impact report discuss the risk that the dump might spread the AIDS virus to landfill workers and visitors through the dumping of used condoms.[4] After the appropriate agency investigated the claim, the Coalition demanded a further report on the possibility that seagulls might pick up the condoms and carry them to urban areas nearby, creating a widespread AIDS epidemic.[5] These far-reaching environmental concerns, among others, generated a 1475-page report costing more than $1.2 million for the building of a relatively low-cost landfill.[6]

The above example illustrates how an adversarial group can use the procedural aspects of an environmental policy to delay and dis-

1. Address before the Colorado Live Stock Association (Aug. 29, 1910).

2. Kenneth R. Weiss, *Reports Have an Impact on Environment*, L.A. TIMES, Sept. 15, 1991, at B1.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

courage any project that they oppose.[7] Although the adoption of state environmental policies reveals noble legislative goals, problems surface because of the complexity and confusion engendered through the statutes' implementation. This Comment will address the problems with CEQA stemming from nebulous definitions within the statute by reviewing the past twenty years of CEQA cases in the California courts. This Comment will also highlight specific instances of abuse that adversarial groups effect through the environmental impact report procedural process. It will peruse the policies of New York and Washington, two progressive environmental states, and discuss the successful features of these states' statutes. Finally, this Comment will recommend avenues for improving CEQA, including the possibility of incorporating lessons learned from other states' statutes into the California statute. The suggested incorporation would conform to the specific needs of California.

## II. THE BIRTH OF ENVIRONMENTAL POLICY

Increases in population limit resources and cause governments to assess the availability and protection of endangered resources.[8] On January 1, 1970, President Nixon signed the National Environmental Policy Act (NEPA)[9] in response to growing concerns for protecting the environment.[10] The statute, along with the subsequently formed Council on Environmental Quality (CEQ),[11] comprehensively outlined the procedural methods and substantive policies for conserving the environment.[12] Courts have generally accepted the procedural

7. *Id.* (citing William Fulton, urban planner and author of *Guide to California Planning*).

8. *See* CAL. PUB. RES. CODE § 21000 (West 1986); WASH. REV. CODE ANN. § 43.921C.020 (West 1983); N.Y. ENVTL. CONSERV. LAW § 8-0103 (McKinney 1984). Although other states adopting an environmental policy have similar language in their policy sections, this article will address these three statutes in depth.

9. 42 U.S.C. §§ 4321-4375 (1988). For cases supporting NEPA as a statutory mandate on federal agencies, see Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971). *Calvert Cliffs'*, an often noted case, defined the scope of NEPA: "NEPA, first of all, makes environmental protection a part of the mandate of *every* federal agency and department." *Id.* at 1112 (emphasis added).

10. Many factors encouraged President Nixon to sign the bill. The public grew increasingly wary of the Vietnam War and a careless oil spill in Santa Barbara destroyed populations of seabirds. *See* Michael C. Blumm, *The National Environmental Policy Act at Twenty: Preface*, 20 ENVTL. L. 447, 448 (1990). Political concerns also affected the President's decision to respond to public and congressional outcry for a uniform environmental policy.

11. 40 C.F.R. §§ 1500.1-1517.7 (1991). The Council on Environmental Quality (CEQ) consists of three members who report to the President on the quality of the environment and offer suggestions as to favorable policies to follow. 42 U.S.C. § 4342 (1988).

12. Section 4332(1) of NEPA set forth the policies Congress intended to achieve while Section 4332(2) established the procedural methods for accomplishing these poli-

aspects of NEPA,[13] but have de-emphasized the significance of policies envisioned by Congress to cure the world's environmental ills.[14] The major issues facing state environmental policies pertain to procedural implementation. More specifically, legislatures and courts attempt to provide adequate definitions of a "project" and the "significant effect" a project may have on the environment.[15] Initially, states based their definitions on those coined in NEPA.[16] NEPA procedurally requires all federal agencies to review legislative proposals and *major* federal actions.[17] The agency responsible for the action first completes an environmental assessment of the proposed action.[18] If the action rises to the level of significance, the agency

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cies. The policies include a broad range of goals encompassing both national and worldwide concerns. 42 U.S.C. § 4332 (1988). Notwithstanding these policies, the United States Supreme Court determined that NEPA manifests a purely procedural guideline for agency actions rather than a universal doctrine acting as a catalyst to harmonize man and nature. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978). In fact, the United States Supreme Court has held in favor of governmental agencies in all NEPA cases where the plaintiff sought a substantive agency decision declaring a project adverse to the environment. *See* David C. Shilton, *Is The Supreme Court Hostile To NEPA? Some Possible Explanations For A 12-0 Record*, 20 ENVTL. L. 551 (1990). Notably, the Court discourages judicial action in NEPA cases by allowing great deference to the appropriate agency and its decision or by looking to CEQ for guidelines. *Id.* at 566-67. *See, e.g.*, *Vermont Yankee*, 435 U.S. at 558 ("NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural"); Kleppe v. Sierra Club, 427 U.S. 390, 401-02, 406 n.15 (1976) (choosing procedural precision over substantive authority); Andrus v. Sierra Club, 442 U.S. 347, 355 (1979) (showing deference to the CEQ to avoid substantive judicial activism); Robertson v. Methow Valley Citizens Council 490 U.S. 332, 353 (1989) (reaffirming that NEPA is essentially procedural). Although the language of NEPA suggests a constitutional mandate, the Supreme Court regards it as merely a statute that heeds the authority of other conflicting statutes. United States v. SCRAP, 412 U.S. 669, 694 (1973); Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776, 787-788 (1976). *Contra* CAL. CODE REGS. tit. 14, § 15040(c) (1990) (environmental policy supplements other laws).

13. *See generally* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978); Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989); Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989). All these cases support the Supreme Court's focus on procedural aspects rather than substantive aspects of NEPA.

14. *See supra* note 12. *Compare* 42 U.S.C. § 4332; CAL. PUB. RES. CODE § 21000; N.Y. CONSERV. LAW § 8-0101; WASH. REV. CODE ANN. § 43.21C.010.

15. *See infra* notes 24-98 and accompanying text (discussing those definitions as applied in CEQA).

16. MANDELKER, NEPA LAW AND LITIGATION § 12:01 (1984).

17. 42 U.S.C. § 4332(2)(C) (emphasis added). CEQ offers specific definitions of what constitutes legislation and what constitutes a major federal action. 40 C.F.R. §§ 1508.17, 1508.18 (1991). The Council provides an extensive outline delineating the appropriateness of an environmental impact statement. *See Id.* § 1502.

18. 40 C.F.R. § 1501.4(b).

must prepare an environmental impact statement.[19] NEPA demands that every federal agency prepare a statement on any legislation or activity having a significant effect on the "quality of the human environment."[20] Following the environmental assessment, the agency may also determine that the action will not have a significant effect on the environment and issue a "finding of no significant effect."[21] In that case, the agency must still make an assessment of the environmental impact.[22] The assessment merely suggests procedures for an environmentally conscious project during the planning stages and fosters NEPA compliance.[23] These federal procedures have guided state legislatures with the fundamentals of instituting their respective environmental policies.

## III. CALIFORNIA ENVIRONMENTAL QUALITY ACT

NEPA led to the adoption of many state environmental policies.[24] Although the procedures outlined in the state doctrines model NEPA, the state goals envision environmental consciousness within its boundaries rather than attempting to cure the world's environmental problems.[25] Unlike the federal courts in NEPA decisions, state courts have embraced environmental policies by promoting judicial interpretation. Furthermore, state courts, in contrast to federal courts, have performed a pivotal function in the development of substantive state environmental policies.

### *A. The Statute*

The California Environmental Quality Act (CEQA) defines its pur-

19. *Id.* §§ 1501.3, 1501.4. Often, the agency prepares an environmental assessment and then determines that the project requires an environmental impact statement. *See Id.* § 1501.4(c).

20. 42 U.S.C. § 4332(2)(C) (emphasis added). CEQ provides a detailed definition of what constitutes "significance" with considerations of both context and intensity. 40 C.F.R. § 1508.27.

21. 40 C.F.R. § 1501.4(e). Some state statutes, guidelines and regulations refer to "a finding of no significant effect" as a negative declaration or a determination of nonsignificance. *See, e.g.*, CAL. PUB. RES. CODE § 21064.

22. 40 C.F.R. § 1501.4(b).

23. *Id.* at § 1508.9(a)(2).

24. Such states include California, Connecticut, Hawaii, Indiana, Maryland, Massachusetts, Minnesota, Montana, New York, North Carolina, South Dakota, Virginia, Washington and Wisconsin. MANDELKER, *supra* note 15, § 12:02.

25. *See generally* 42 U.S.C. § 4332; CAL. PUB. RES. CODE § 21000; CAL. CODE REGS. tit. 14, § 15002 (1990). The California Public Resources Code authorizes the Office of Planning and Research to prepare and develop the Guidelines for Implementation of the California Environmental Quality Act (Guidelines) to assist in CEQA's interpretation. CAL. PUB. RES. CODE §§ 21083, 21087 (West 1986); *see also* CAL. CODE REGS. tit. 14, § 15000 (1990). While the Guidelines state that they bind all state agencies, the courts have yet to embrace the absolute authority of the Guidelines. *See* Laurel Heights Improvement Ass'n of San Francisco, Inc. v. Regents of Univ. of Cal., 764 P.2d 278, 282 n.2 (Cal. 1988).

pose as follows: (1) To inform the public of a proposed project's significant adverse effects on the environment; (2) to identify potential solutions to those adverse effects; (3) to prevent the potential environmental harm by suggesting alternatives and mitigating factors to the project; and (4) to publicize the reasons the agency approved the project.[26] In contrast to the policies of the federal statute, state agencies may reasonably achieve these narrow, yet effective, policies. However, in California, the procedural aspects of CEQA inhibit the attainment of policy goals.

CEQA, instituted eight months after NEPA, provides for a three-step analysis of a proposed activity.[27] The agency first determines whether CEQA should govern the activity. If the activity absolutely will not significantly affect the environment or the activity falls under one of the exemptions, then CEQA requires no further review.[28] Otherwise the agency conducts a preliminary review of an activity, its permits, and other use entitlements[29] to determine whether the activity might have a significant effect on the environment.[30]

Second, in the event that an agency finds no relevant exemptions and a fair argument exists as to potential adverse environmental ef-

26. CAL. CODE REGS. tit. 14, § 15002(a).

27. *See* Daniel P. Selmi, *The Judicial Development of the California Environmental Quality Act*, 18 U.C. DAVIS L. REV. 197, 203-04 (1984).

28. CAL. CODE REGS. tit. 14, § 15002(k)(1). The legislature creates exemptions and the courts will not imply an exemption unless a statute specifically provides for the exemption. *See* Napa Valley Wine Train, Inc. v. Public Utilities, 787 P.2d 976, 978-79 (Cal. 1990) (legislature can create exemption even if it conflicts with the purpose of CEQA); Wildlife Alive v. Chickering, 553 P.2d 537, 539 (Cal. 1976) (courts will not imply exemption without statutory authority). Exemptions include activities not projects under section 15378 definition, statutory exemptions, and categorical exemptions. CAL. CODE REGS. tit. 14, § 15061. Statutory exemptions include ministerial projects (projects which the agency must accept or deny, in other words, it requires no discretion), CAL. PUB. RES. CODE § 21080(b)(1); projects outside California, *id.* § 21080(b)(15); emergencies, *id.* §§ 21172, 21080(b)(2)-(4); school closings, *id.* § 21080.18; *see, e.g.*, East Peninsula Educ. Council, Inc. v. Palos Verdes Peninsula Unified Sch. Dist., 258 Cal. Rptr. 147, 158 (Cal. Ct. App. 1989) (school closing exempt because the resulting changes fall under categorical exemption). *See* CONTINUING EDUCATION OF THE BAR, *The California Environmental Quality Act: Critical Issues, Recent Developments, and Litigation Trends*, REGENTS OF THE UNIVERSITY OF CALIFORNIA, 14-21 (1991) [hereinafter CONTINUING EDUCATION]. Categorical exemptions include small development and construction projects, land use regulation, protection of natural resources, small energy projects, organizing government agencies, government operations, regulatory activities by government agencies, information collection and facilities for public gatherings. CAL. CODE REGS. tit. 14 §§ 15301-28. *See* CONTINUING EDUCATION, *supra*, at 20-21.

29. *See* CAL. CODE REGS. tit. 14, § 15060.

30. *Id.* § 15063(a).

fects of a project,[31] the agency prepares an initial study as to the significance of the effects.[32] If it determines that the activity will not significantly affect the environment, the agency prepares a negative declaration attesting to that fact.[33]

Third, if the agency determines that the project might have a significant effect, it must prepare an environmental impact report.[34] CEQA requires that all state entities prepare an environmental impact report on any "project" which may have a "significant effect on the environment."[35] An agency has the duty to mitigate all significant effects to the level of insignificance.[36] If the agency finds it impossible to mitigate the significant effects, it must provide overriding considerations that mandate approval of the project.[37] In essence, an agency has the substantive power to deny a project solely because of the significant environmental impact.[38] However, some authorities feel that mitigating measures and overriding considerations act as an added procedural step that finalizes the review process.[39] In other words, agencies will either mitigate an environmental impact or find an overriding consideration for the project approval and do not practically institute a final mandate to deny a project.[40] Thus, many authorities stress that CEQA's environmental review process merely informs the public of possible environmental impacts, rather than providing a clear, substantive authority to deny a project.[41]

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31. No Oil, Inc. v. City of Los Angeles, 529 P.2d 66, 77 (Cal. 1974); Sundstrom v. County of Mendocino, 248 Cal. Rptr. 352, 360-61 (Cal. Ct. App. 1988).

32. CAL. CODE REGS. tit. 14, § 15063(a).

33. *Id.* § 15063(b)(2).

34. *Id.* § 15063(b)(1).

35. CAL. PUB. RES. CODE § 21100 (West 1986).

36. *Id.* §§ 21002, 21081; CAL. CODE REGS. tit. 14, §§ 15002(a)(3), 15021(a)(2), 15091(a). *See also* Sierra Club v. Gilroy City Council, 271 Cal. Rptr. 393, 398 (Cal. Ct. App. 1990) (agency not required to deny project if it shows mitigation of effect on rare endangered species even though its perpetuation not guaranteed); Kings County Farm Bureau v. City of Hanford, 270 Cal. Rptr. 650, 656 Cal. Ct. App. (1990) (court will not pass on the environmental findings of the agency, only whether it adequately addressed the relevant material).

37. CAL. PUB. RES. CODE §§ 21083, 21087; CAL. CODE REGS. tit. 14, §§ 15093, 15043(b). The overriding considerations were not included in the original CEQA statute.

38. CAL. CODE REGS. tit. 14, § 15042.

39. Telephone Interview with Professor Hap Dunning, University of California at Davis (April 6, 1992). *See* San Diego Trust & Savings Bank v. Friends of Gill, 174 Cal. Rptr. 784, 790 (Cal. Ct. App. 1981) (the agency must use its substantive authority with caution so as not to invoke inverse condemnation).

40. Interview with Patrick Mitchell, an Associate with Gresham, Varner, Savage, Nolan & Tilden in San Bernardino, California (March 31, 1992). Mr. Mitchell concentrates on environmental law and is extremely knowledgeable in the CEQA process.

41. *See* William L. Waterhouse, *California Environmental Quality Act Update*, 327 PRACTISING LAW INSTITUTE, REAL ESTATE LAW AND PRACTICE COURSE HANDBOOK, 473 (March 1, 1989) ("CEQA is viewed . . . as a procedural statute which requires preparation of an EIR as an informational document, not as a document which mandates a particular project decision.").

Initial problems arise in the interpretation of what constitutes a "project" and "significant effect" under the statute. The California Code of Regulations defines both "project" and "significant effect."[42] While the Code has given only theoretical and vague applications of these definitions to a proposed activity, the courts and the legislature have struggled to define a cohesive scheme that efficiently guides a project in its environmentally conscious development.[43] The legislature has codified several holdings of the judiciary which further broaden CEQA and add to its complexity.[44] In all, the combined legislative and judicial procedures for implementing environmental policy has merely delayed and increased the costs of environmentally conscious action, rather than promoting environmental quality.[45] Ironically, in contrast to NEPA,[46] the state statute delineates a viable policy, but fails to procedurally institute its policy goals.

### *B. State Cases Interpreting and Developing CEQA*

The vague statutory language of CEQA necessitated further judicial development of the act.[47] Not only did the vague language result in immediate and frequent litigation to determine the statute's scope, but it elicited resounding criticism of frivolous lawsuits brought under definitional guise.[48] Public interest groups as well as con-

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42. *See* CAL. CODE REGS. tit. 14, §§ 15000-15387. Section 21065 of CEQA defines project as

> (a) [a]ctivities directly undertaken by any public agency, (b) [a]ctivities undertaken by a person which are supported in whole or in part through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies, or (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.

CAL. PUB. RES. CODE § 21065. Section 15382 of the California Code of Regulations defines a "significant effect" as a "substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, mineral, flora, fauna, ambient noise, and objects of historic or aesthetic significance." CAL. CODE REGS. tit. 14, § 15382.

43. *See infra* notes 43-94 and accompanying text. *But see* Selmi, *supra* note 27, at 286 (stating that the courts have successfully "delineated the parameters of an Act notable for containing a host of vague terms").

44. *See* CAL. CODE REGS. tit. 14, §§ 15301-28.

45. *See infra* notes 242-84 and accompanying text (an empirical study of CEQA and current problems with the statute).

46. *See supra* notes 11-23 and accompanying text (outlining the procedural aspects of NEPA).

47. *See* Selmi, *supra* note 27.

48. *Id.* at 199 (citing Ashby, *Developers Back Proposals to Alter Environmental Act*, L.A. DAILY J., Nov. 24, 1983, at 1, col.6). *See* Wildlife Alive v. Chickering, 553 P.2d 537 (Cal. 1976); Bozung v. Local Agency Formation Commission of Ventura County,

cerned private citizens have instituted litigation on issues mainly involving what constitutes a "project" and what constitutes a "significant effect" under CEQA.[49] These two issues basically determine when an agency must prepare an environmental impact report. Making these determinations often confuses the significance of future projects, cumulative impacts, long-term effects and other speculative concepts that foster CEQA's complicated procedures. A review of the judicial development reveals the initial criticisms and the present confusion, both of which evolve from the multitude of decisions involving the definitions and interpretations of "project" and, more importantly, "significant effect."

1. What constitutes a project under CEQA?

The California Supreme Court first addressed CEQA in the seminal decision, *Friends of Mammoth v. Board of Supervisors*.[50] The court addressed the issue of whether CEQA applied to a private party seeking a conditional use and building permit from a state agency.[51] In *Friends of Mammoth*, a private party sought an application for the permits required to build a multi-story housing and condominium complex.[52] The Mono County Planning Commission subsequently approved the application.[53] Plaintiffs, intending to protect their small community, objected to the approval on the grounds that the project would create water and sewage problems within the area.[54] They contended that the Commission invalidly issued the permit.[55] The court agreed with the plaintiffs in holding that the issuance of a use permit to a private party constituted a "project" under the statutory language of CEQA.[56]

Prior to *Friends of Mammoth*, CEQA gave no definition of "pro-

529 P.2d 1017 (Cal. 1975); No Oil, Inc. v. City of Los Angeles, 529 P.2d 66 (Cal. 1974); Friends of Mammoth v. Board of Supervisors of Mono County, 502 P.2d 1049 (Cal. 1972). In order to prevent the frivolous lawsuits, opponents of CEQA unsuccessfully sought several refinements of the statute including "wholesale exemptions from the Act's environmental impact reporting mandate 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." Selmi, *supra* note 27, at 199. While the legislature rejected these solutions, they did adopt other, less drastic revisions. *See id.* at 199-200 n.10. *See infra* notes 242-65 and accompanying text for illustrations of how adversarial groups use CEQA to fight disfavored projects on non-environmental grounds.

49. *See infra* notes 50-147 and accompanying text (cases discussing how courts have defined "project" and "significant effect").

50. 502 P.2d 1049.

51. *Id.* at 1052.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 1054.

ject."[57] The court ruled that it must interpret legislative intent where the legislature fails to specifically set forth its intentions.[58] Based on the broad intent of the legislature, the court concluded that the statute must have contemplated that state agencies would comply with CEQA on all matters where CEQA required the agency to make a discretionary determination.[59] Thus, instead of applying only to government initiated projects, CEQA included private projects where a state agency "has some minimal link with the activity, either by direct proprietary interest or by permitting, regulating, or funding private activity."[60]

*Friends of Mammoth* had an extraordinary effect on the environmental policy. CEQA's predecessor, NEPA, applied strictly to federal agency actions.[61] Now, under CEQA, any project sponsor seeking governmental authorization had to consciously weigh environmental concerns. While this fostered the policy of the statute, it also liberalized CEQA and catalyzed its over-expansion.[62]

Following the *Friends of Mammoth* decision, California courts

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57. *Id.*

58. *Id.* The court interpreted the language of Sections 21000 and 21001 of the Act. It found that the legislature intended Section 21000 to regulate all activities involving a governmental agency. The specific language of the statute states: "It is the intent of the Legislature that all agencies of the state government which regulate activities of private individuals, corporations, and public agencies which are found to affect the quality of the environment, shall regulate such activities so that major consideration is given to preventing environmental damage." CAL. PUB. RES. CODE § 21000 (amended 1979). With the use of the word "regulation," the court determined that the legislature "desired to ensure that governmental entities in their *regulatory* function would determine that private individuals were not forsaking ecological cognizance in pursuit of economic advantage." *Friends of Mammoth*, 502 P.2d at 1055.

59. *Friends of Mammoth*, 502 P.2d at 1055. The court, in an oft-quoted portion of its opinion, stated that "we conclude that the Legislature intended the [C]EQA to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." *Id.* at 1056.

60. *Id.* at 1059. *Friends of Mammoth* influenced the legislature to adopt a definition of "project" in section 21065 of the California Public Resources Code, which includes private "activities involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies." CAL. PUB. RES. CODE § 21065(c). The California Code of Regulations provides a more precise definition as promulgated by *Friends of Mammoth*,

> [a] private project means a project which will be carried out by a person other than a governmental agency, but the project will need a discretionary approval from one or more governmental agencies for (a) a contract or financial assistance, or (b) a lease, permit, license, certificate, or other entitlement for use.

CAL. CODE REGS. tit. 14, § 15377.

61. *See supra* notes 15-23 and accompanying text (defining NEPA procedures).

62. *See* Selmi, *supra* note 27, at 213-15.

made increasingly broad interpretations of CEQA's scope and application to diversified public agency decisions.[63] For example, the California Supreme Court broadened its interpretation of a "project" in *Bozung v. Local Agency Formation Commission of Ventura County*.[64] In *Bozung*, the City of Camarillo sought approval from the Local Agency Formation Commission of Ventura County (LAFCO) to annex property.[65] After LAFCO approved the annexation, residents filed an action to set aside the approval on the grounds that the annexation required an environmental impact report.[66] The residents contended that the City contemplated future plans to develop the property and, therefore, the possibility of development propelled the CEQA process.[67] In this case, the court again faced the issue of whether this particular activity constituted a project and whether it would have a significant effect on the environment.

In addressing whether the annexation constituted a "project," the court relied heavily on language from the California Administrative Code (Guidelines).[68] The court, interpreting the Guideline's all-inclusive definition of a "project," determined that the annexation constituted a "local General Plan" under which the agency must make a significance determination.[69] Next, the court focused on the agency's relation to the annexation in holding that "while a general plan is by its very nature tentative and subject to change, a LAFCO approval of an annexation is an irrevocable step as far as that particular agency is

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63. *Id.*

64. 529 P.2d 1017 (Cal. 1978).

65. *Id.* at 1021. The county formed LAFCO, among other reasons, to approve or disapprove city proposals to annex property into the county. *Id.* at 1020.

66. *Id.* at 1021-22.

67. *Id.* at 1021. The City and Kaiser Aetna planned the annexation because Kaiser's property fell between the City and an unincorporated area. *Id.* at 1020. Kaiser planned to develop recreational, commercial and residential property, but contemplated no specific plans. *Id.* The plaintiffs relied on the language in *Friends of Mammoth* stating that CEQA should apply at the earliest possible stage of the project. *Id.* at 1024 (citing Friends of Mammoth v. Board of Supervisors of Mono County, 502 P.2d 1049, 1056 (Cal. 1972)).

68. The California Administrative Code was renamed the California Code of Regulations. The court stated that CEQA consisted of three items: the original 1970 legislation, the 1972 revisions following *Friends of Mammoth* and the Guidelines. *Id.* at 1024. While Section 21083 of the California Public Resource Code provides for the creation of the Guidelines, the courts have not consistently considered them as an omnipresent rule of law. *See* Laurel Heights Improvement Ass'n of San Francisco, Inc. v. The Regents of the Univ. of Cal., 764 P.2d 282, 293 n.2 (Cal. 1988) (whether the Guidelines establish regulatory mandates is an issue which the courts have yet to address); Friends of La Vina v. Los Angeles County, 284 Cal. Rptr. 171, 175 n.5 (Cal. Ct. App. 1991) (same).

69. *Bozung*, 529 P.2d at 1027. The Guidelines delineate one definition of a "project" as an "enactment and amendment of zoning ordinances, and the adoption of local General Plans or elements thereof . . . ." CAL. CODE REGS. tit. 14, § 15037.

concerned."[70] Thus, the court required the agency to treat an annexation as a project under CEQA.

The *Bozung* court, promoting subsequent borderline decisions, took the determination of what constitutes a "project" one step further. In effect, the court found a "project" where no activity actually took place.[71] This decision foreshadowed the undue costs and waste resulting from the improper application of CEQA requirements.[72] The *Bozung* court's application of CEQA is contrary to the language in *Friends of Mammoth* regarding minor activities.[73] The proper application of CEQA after *Friends of Mammoth* should strictly read: "CEQA applies only when a public agency directly engages in construction, acquisition, or development or when it regulates private construction, acquisition, or development."[74] Therefore, the agency would review the specific environmental effects of a project in accordance with established development plans. Preferably, CEQA would not force an agency to make repetitive and speculative determinations at every stage in which development might feasibly occur.

2. CEQA's significance determination

After expanding the definition of a project, the *Friends of Mammoth* court tackled the "significant effect" issue. The court recognized that the determination of whether there is a "significant effect" on the environment is a question of degree.[75] It emphasized that the specific interpretation of such statutory language will arise through a case-by-case adjudication.[76] Setting precedent for the onslaught of

70. *Bozung*, 529 P.2d at 1027 (citation omitted). The court found that city annexation fell under Subdivisions (a) and (c) of Section 21065 of CEQA. *Id.*

71. The dissent staunchly expounds that *Friends of Mammoth* intended that "the EIR requirement applies only to land development and use activities, and land use regulation resulting in authorization or limitation of land use." *Id.* at 1035. Although the decision applied to private projects and *Bozung* applies to public projects, the dissent argues that when the court in *Friends of Mammoth* interpreted the scope of the statute, no intent to distinguish the boundaries of private and public projects existed. *Id.* at 1036.

72. *See infra* notes 242-65 and accompanying text (an empirical study of CEQA).

73. *See supra* note 60 (*Friends of Mammoth* interpretation of a project).

74. *Bozung*, 529 P.2d at 1036 (Clark, J., dissenting) (italics omitted). Justice Clark reveals how ludicrous the *Bozung* case is by analogizing the majority's reasoning to receiving a driver's license. The Department of Motor Vehicles issues a driver's license that may ultimately cause the development of land due to the need for more highways and freeways as more drivers obtain permits. Thus, a driver's license should require an environmental impact report. *Id.* at 1037 (Clark, J., dissenting).

75. *Id.*

76. Friends of Mammoth v. Board of Supervisors of Mono County, 502 P.2d 1049, 1065 (Cal. 1972).

CEQA cases, the *Friends of Mammoth* case directed that "the courts will not countenance abuse of the 'significant effect' qualification as a subterfuge to excuse the making of impact reports otherwise required by the act."[77] Although it attempted to discourage frivolous lawsuits by expressly stating that the decision will not impact minor improvements to small dwellings,[78] the court implicitly encouraged subsequent litigation.[79] Thus, the court's first experience with CEQA led to broad interpretations which opened the floodgates to expansive litigation defining the elements of CEQA.[80]

The most astounding effect on a significance determination came in the California Supreme Court decision *No Oil, Inc. v. City of Los Angeles*.[81] In *No Oil*, the City of Los Angeles decided not to prepare an environmental impact report before enacting zoning ordinances which would allow exploratory oil drilling in Pacific Palisades.[82] The plaintiffs sought to invalidate the ordinances because the City failed to prepare an impact report regarding the significant effects that future drilling might have on the environment if the drilling company struck oil.[83] The defendants argued that they could not calculate the significant environmental effects of the drilling until they received the exploration results.[84] Thus, the court had to decide whether the City possessed sufficient and relevant data to submit a reliable environmental impact report.[85]

The court followed the *Friends of Mammoth* holding in reinforcing the wide latitude given to significant impact determinations.[86] It acknowledged that the word "significant" contained a multitude of meanings that a court must address.[87] In reiterating the language of

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77. *Id.*

78. *Id.* The court focused on the language of the statute which requires an environmental impact report when an activity "may" or "could" have a significant impact on the environment. *Id.*

79. *See* Waterhouse, *supra* note 41.

80. *But see infra* notes 284-301 and accompanying text (courts showing an intolerance for frivolous litigation).

81. 529 P.2d 66 (Cal. 1974).

82. *Id.* at 69.

83. *Id.* at 71-72.

84. *Id.* at 72.

85. *Id.*

86. *Id.* at 76. Initially, the court determined that even if the city did not find a significant impact, it must make a written declaration to that fact—a Negative Declaration. *Id.* at 73.

87. *Id.* at 76. *No Oil* provides background for these meanings:

> As stated by Judge Friendly, construing the phrase 'significantly affecting quality of the human environment' in NEPA: 'While . . . determination of the meaning of 'significant' is a question of law, one must add immediately that to make this determination on the basis of the dictionary would be impossible. Although all words may be 'chameleons, which reflect the color of their environment,' 'significant' has that quality more than most. It covers a spectrum ranging from 'not trivial' through 'appreciable' to 'important' and even 'momentous.' " *Id.* at 76 n.16 (citations omitted).

*Friends of Mammoth*, the court wrestled with the breaking point where an activity encompasses a possible significant harm to the environment.[88] *No Oil* ultimately broadened the scope of the term "significant effect" in two ways that encouraged subjective interpretation. First, the court held that a government agency must consider preliminary projects and their short-term effects when substantial evidence shows a fair argument that the project might have a significant effect on the environment, regardless of its permanence and duration.[89] Second, the court noted that public controversy alone sufficiently demonstrates the need for an environmental impact report, even though an opposing party may fabricate widespread public controversy to achieve adverse results.[90] Nevertheless, the court felt that any public controversy signified the need for a report.[91]

Like *No Oil*, the *Bozung* court turned to *Friends of Mammoth* in deciding the significant effect issue.[92] Analogizing the annexation to the conditional use permit in *Friends of Mammoth*, the court in *Bozung* stated that the project need not have a direct effect on the environment.[93] Rather, the project only needs to "culminat[e] in physical changes to the environment."[94] Furthermore, even though the City had not made concrete plans for the use of the annexed

88. *Id.* at 76. The court quoted language used by the *Friends of Mammoth* court in describing the latitude of a "project" definition: "[T]he Legislature intended [CEQA] to be interpreted in such a manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." *Id.* (quoting Friends of Mammoth v. Board of Supervisors of Mono County, 502 P.2d 1049, 1056 (Cal. 1972)). Other courts previously applied the language to "significant effect." *See* County of Inyo v. Yorty, 108 Cal. Rptr. 377, 406 (Cal. Ct. App. 1973); Environmental Defense Fund, Inc. v. Coastside County Water Dist., 104 Cal. Rptr. 197 (Cal. Ct. App. 1972).

89. *No Oil*, 529 P.2d at 77 (quoting *Yorty*, 108 Cal. Rptr. at 387).

90. *Id.* at 77-78. The court emphasized that an environmental impact report notifies the public that the government agency has considered the effects the project will have on the community and that a Negative Declaration does not adequately serve this purpose. *Id.* at 78.

91. The court failed to quantify what constituted a public controversy. Subsequently, one court of appeal interpreted Section 21082.2 of the Public Resource Code to mean that "[t]he existence of a public controversy over the environmental effects of a project shall not require preparation of an environmental impact report if there is no substantial evidence before the agency that the project may have a significant effect on the environment." Citizens Ass'n for a Sensible Dev. v. County of Inyo, 217 Cal. Rptr. 893, 906 (Cal. Ct. App. 1985). This is the current state of the law. *See* CAL. CODE REGS. tit. 14, § 15064(h).

92. Bozung v. Local Agency Formation Comm'n of Ventura County, 529 P.2d 1017 (Cal. 1978).

93. *Id.* at 1027-28.

94. *Id.* at 1028 (quoting Friends of Mammoth v. Board of Supervisors of Mono County, 502 P.2d 1049, 1061 (Cal. 1972)).

land, the court held that an agency must prepare an environmental impact statement at the earliest possible stage of the project development.[95]

As the dissent in *Bozung* adamantly pointed out, this case illustrates the problems with CEQA interpretation.[96] The court recklessly subjected property acquisition to CEQA regulations under the guise of policy, even though the acquisition revealed no consequential effect to the environment.[97] In contrast, even though *Friends of Mammoth* applied CEQA to a private action, it did so in a land *use* situation.[98]

### 3. Subsequent application of California Supreme Court cases by the Courts of Appeal

A quick review of important courts of appeal cases illustrates the historical confusion leading to the present issues facing today's courts in interpreting CEQA. In sum, while courts generally do not challenge the definition of a "project,"[99] the "significant effect" threshold has given the judiciary considerable problems with consistency.[100] One problem stems from the amount of discretion each agency has in determining what constitutes a "significant effect." CEQA gives broad guidelines which require an inquiry into all potential impacts including direct, indirect, secondary, consequential, future, cumulative and growth-inducing impacts, as well as public controversy.[101] Another problem has been defining the "fair argument" standard for finding a significant impact. Some courts liberally apply the standard

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95. *Id.* at 1030. The court emphasized that approval of an annexation is not a future action, but a present reality. The court solidified its decision on the preliminary plans of development by the City and Kaiser. *Id.* at 1029.

96. *Id.* at 1035 (Clark, J., dissenting) ("Obviously, the Legislature did not intend CEQA to apply to such decisions, and any construction requiring this application would be absurd.").

97. *See Bozung*, 529 P.2d at 1035 (Clark, J., dissenting).

98. *Id.* at 1035 (Clark, J., dissenting). *See also Friends of Mammoth*, 502 P.2d at 1063-66.

99. *See* Selmi, *supra* note 27, at 217-19. This is not to say that a creative approach to project definitions would not help to ease the controversial significance determination. *See infra* notes 310-21 and accompanying text.

100. Recently, one court found that the definition of significance requires agencies to apply discretionary standards. *See* Citizen Action to Serve All Students v. Thornley, 272 Cal. Rptr. 83, 87 (Cal. Ct. App. 1990). Even though the Public Resources Code defines "significant effect" as having a *substantial* effect on the environment (Section 21068), in *Friends of Mammoth*, the court set a precedent that requires an agency to prepare an environmental impact report when a project "could" have a significant effect. *See* CONTINUING EDUCATION, *supra* note 28. Since the California Supreme Court has not overruled or modified *Friends of Mammoth*, it remains unclear what threshold to apply or how to define each threshold.

101. *See generally* CAL. PUB. RES. CODE §§ 21000-21190.

to encompass a broad range of impacts[102] while other courts have tried to narrow the standard.[103] Currently, the California judicial districts are divided on the exact application of the "fair argument standard."[104]

The opinion in *No Oil*,[105] which set the parameters for a significance determination, influenced the California Court of Appeal decision in *Sundstrom v. County of Mendocino*.[106] In *Sundstrom*, a motel owner sought a use permit to build a private sewage treatment plant.[107] A nearby small town, with existing sewage problems, opposed the permit because it might affect the town's ability to generate support for a public sewage treatment plant.[108] The Planning Commission issued a negative declaration with attached mitigating conditions on the proposal to build the private sewage plant.[109]

The *Sundstrom* court held, under the two significance tests enunciated in *No Oil*,[110] that substantial evidence of a fair argument compels an agency to issue an environmental impact report, but that in some cases the court could show the existence of a fair argument on limited facts.[111] First, by failing to present concrete facts that a project will not significantly impact the environment, one could infer from the absence of substantial evidence that a fair argument exists.[112] Second, the court determined that the agency must consider public controversy in marginal cases where the evidence fails to clearly show a significant effect on the environment.[113] This interpretation, currently the prevailing law, narrowed the public controversy issue. Now the establishment of a controversy must be based

102. *See, e.g.*, Friends of "B" Street v. City of Hayward, 165 Cal. Rptr. 514, 523-24 (Cal. Ct. App. 1980).

103. *See* Board of Supervisors of Sacramento County v. Sacramento Local Agency Formation Comm'n, 286 Cal. Rptr. 171 (Cal. Ct. App. 1991).

104. *See infra* note 290 (citing cases that delineate the discrepancy in interpretation of "fair argument").

105. 529 P.2d 66 (Cal. 1974).

106. 248 Cal. Rptr. 352 (Cal. Ct. App. 1988).

107. *Id.* at 354.

108. *Id.* at 356.

109. *Id.* at 355-56. The opponents filed suit on grounds that the agency failed to properly review the environmental impact of the project. *Id.* at 356.

110. *See supra* notes 89-91 and accompanying text (discussing the "fair argument" and "public controversy" standards).

111. *Id.* at 361. The court explained that the burden of environmental investigation should be on the government and not on the public. *Id.*

112. *Id.*

113. *Id.*

on environmental concerns.[114] In *Sundstrom*, the evidence did not substantially reveal a significant impact on the environment. Rather, in the minds of the small community, it jeopardized the viability of a public sewage plant. Furthermore, future speculative impacts created doubt as to the project's overall environmental impact.[115] While the result shows the inadequacy of report drafting, it also reveals the potential abuse of the significance standard. Furthermore, the California judicial districts have failed to adopt a consistent approach to the "fair argument" test.[116]

Another problem with CEQA arose soon after *Bozung*, in *Simi Valley Recreation and Park District v. Local Agency Formation Commission*.[117] *Simi Valley* revealed problems in defining "project."[118] The court retreated from the *Bozung* decision in deciding whether a property detachment constituted a project. It stated that LAFCO's decision to detach land from the Park and Recreation District would not physically change the use of the land.[119] Following *Friends of Mammoth*, the court held that an activity must have some minimal link with governmental activity which promotes a physical change in the use of the land to constitute a project.[120] It also distinguished *Bozung*'s definition[121] of a project in several ways: (1) the court in *Bozung* stated that it based its decision on a unique fact scenario; (2) in *Bozung*, the decision of LAFCO was deciding whether any development on the land would ensue, whereas in *Simi Valley*, no development concerns existed; and (3) *Bozung* constituted a discretionary project in contrast to the ministerial project in *Simi*

114. *Id.* *See infra* note 243 (discussing the elements of public controversy and controversy between experts).

115. *Id.* at 357-59.

116. *See infra* note 290 (citing differing cases). *See, e.g.*, Sacramento County Bd. of Supervisors v. Sacramento Local Form. Comm'n, 286 Cal. Rptr. 171, 182 (Cal. Ct. App. 1991) ("[c]ourt determines only whether there is a fair argument of a significant environmental impact, not whether there actually is or is not an impact").

117. 124 Cal. Rptr. 635 (Cal. Ct. App. 1975).

118. *See* Selmi, *supra* note 27, at 217 (the determination of whether an annexation constitutes a project creates particular problems). Selmi states that not only does a broad application of CEQA create increased bureaucratic responsibility, but "the interpretation of project by the supreme court requires public agencies to examine almost every action they take for possible environmental consequences." *Id.* at 215. *See also* City of Redding v. Shasta County Local Agency Form. Comm'n, 257 Cal. Rptr. 793, 795-98 (Cal. Ct. App. 1989) (LAFCO decision not a project); City of Agoura Hills v. Local Agency Form. Comm'n, 243 Cal. Rptr. 740, 748-50 (Cal. Ct. App. 1988) (LAFCO decision not a project); City of Livermore v. Local Agency Form. Comm'n, 230 Cal. Rptr. 867 (Cal. Ct. App. 1986) (LAFCO revision held a project); People ex. rel. Younger v. Local Agency Form. Comm'n, 146 Cal. Rptr 400 (Cal. Ct. App. 1978) (annexations and de-annexations held as projects).

119. *Simi Valley*, 124 Cal. Rptr. at 646.

120. *Id.* *See also* Friends of Mammoth v. Board of Supervisors of Mono County, 502 P.2d 1049, 1065-66 (Cal. 1972).

121. *See supra* notes 92-95 and accompanying text (discussion of the *Bozung* interpretation).

*Valley*.[122]

While the proper CEQA interpretation unfolded in *Simi Valley*, the case further revealed the inconsistency of CEQA. Essentially, the detachment process mirrored the annexation process. In both situations, the owners contemplated development on the land without specific plans; LAFCO made a final decision as it pertained to that government agency; and LAFCO's decision had no foreseeable effect on the environment. Therefore, the courts should have reached the same result, but the problems surrounding CEQA's definitions and implementation prevailed.

Serious problems also arise when courts attempt to consistently apply a "significant effect" threshold. The problem centers on whether an agency must prepare an environmental impact report that contemplates possible future development, either of unknown type or scope. Early cases attempted to consistently apply the California Code of Regulations Guideline for Implementing CEQA while interpreting the initial supreme court precedents, particularly the *No Oil* standards.[123]

The California Court of Appeal for the Second District, in one of the earliest decisions outlining the requirement of future developments in an environmental impact report, seemed undaunted by *Bozung*.[124] In *Topanga Beach*, the court held that the State's acquisition of beachfront property and displacement of renters did not encompass a significant effect on the environment, even though the State planned to demolish the existing structures.[125]

Like in *Bozung*, the State ultimately planned to develop the land.[126] The court stated that undetermined and uncertain development does not create a possibility of a significant effect on the environment and that requiring an agency to prepare an environmental impact report would engender speculation.[127]

In *Lake County Energy Council v. County of Lake*, the court also

122. *Simi Valley*, 124 Cal. Rptr. at 646-47. The court further distinguished *Bozung* by stating that LAFCO essentially provided the City of Camarillo with a use entitlement. *But see Bozung*, 529 P.2d at 1036 (Clark, J., dissenting).

123. *See* Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal., 764 P.2d 278, 293 n.2 (Cal. 1988).

124. Topanga Beach Renters Ass'n v. Department of Gen. Serv., 129 Cal. Rptr. 739 (Cal. Ct. App. 1976).

125. *Id.* at 743.

126. Although the State never expressly stated any plans, one could speculate that the state had bought the beachfront property with plans of developing or selling the land for profit.

127. *Id.* at 743.

disregarded past authority.[128] The court held that a speculative activity does not constitute a significant effect on the environment at the initial stage of development.[129] The Lake County Energy Council planned to perform exploratory drilling in search of geothermal resources.[130] Since the Council could not effectively determine the impact of a successful exploration program nor counterbalance those impacts with the benefits derived, the court found that an environmental impact must include the initial short-term impact.[131] However, the court determined that the possible subsequent impacts from future development must await the outcome of the exploration.[132] The court of appeal strayed from the supreme court decision in *No Oil*, even though the courts heard similar facts.[133] Commercial development often does not follow exploratory drilling. While the actual exploration does reveal a need for an impact report due to possible adverse effects,[134] many administrative decisions, financial considerations and possible environmental concerns follow a successful exploration program. Thus, an impact report at the earliest stage in this scenario proves wasteful and costly, despite the considerations referred to in *No Oil*.[135]

*McQueen v. Board of Directors*[136] presented a more liberal interpretation of the *Bozung* argument in deciding whether a "significant effect" exists when a local government agency acquires property. In *McQueen*, the Board of Directors sought to buy two parcels of land from the federal government.[137] The land included transformers that contained polychlorinated biphenyls (PCBs).[138] The federal government took responsibility for the removal and disposal of the the transformers.[139] In the interim, the Board of Directors stored the PCBs, but made no specific plans for the land's use nor did they adopt plans for the disposal of the PCBs.[140] The court held that the Board of Directors could not acquire land containing PCBs without an environmental impact report.[141]

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128. 139 Cal. Rptr. 176 (1977).
129. *Id.* at 179.
130. *Id.* at 177.
131. *Id.*
132. *Id.* The court stated that the exploratory drilling was a necessary precedent to a large scale project and the overall impact of a commercial project was key to their decision of allowing the exploratory drilling. *Id.*
133. *See supra* notes 81-91 and accompanying text (entire discussion of *No Oil*).
134. The digging could cause land subsidence or other environmental harms such as sliding.
135. *See supra* notes 81-91 and accompanying text (entire discussion of *No Oil*).
136. 249 Cal. Rptr. 439 (Cal. Ct. App. 1988).
137. *Id.* at 441.
138. *Id.*
139. *Id.*
140. *Id.* at 442.
141. *Id.* at 445.

Initially, the court determined that the acquisition of land with PCBs falls under the early courts' broad interpretation of a "project."[142] Next, the court found that an acquisition of property containing PCBs unequivocally might have a significant impact on the environment even though the Board had no immediate plans for the land's use.[143] It expressed concern over the inadequate consideration of toxic waste regulations before the Board of Directors adopted the project.[144] The court also rejected the Board of Directors' argument that it delegated responsibility to the federal government as a former property owner.[145]

With *Bozung* as its precedent, the court categorized an acquisition of property causing no physical change to the environment as having a significant effect on the environment.[146] It disregarded the actual effect the acquisition had on the environment and focused on the possibility that the acquisition *might eventually* result in a physical change.[147] Requiring an environmental impact at the stage of acquisition established a restraint on property rights and promoted unwarranted paperwork and costs just because the court had reservations regarding the nature of the property. Although many of these cases possess detailed and peculiar factual distinctions, the courts, such as in *McQueen*, have prematurely and arbitrarily applied CEQA to questionable cases. The result is a failure to provide any concrete message as to when environmental impact reports are required. This creates confusion which allows project opponents ample opportunity to force an undesirable project into the judicial system, thereby increasing costs and delays.

Allowing the judiciary to cure the ills of CEQA consumes an inordinate amount of time and fails to deter project opponents from asserting controversial pressure on project sponsors before the

142. *Id.* at 443. The court felt that the Board of Directors attempted to divide its acquisition of the land into segments in order to skirt the project definition. It stated, "A narrow view of a project could result in the fallacy of division that is, overlooking its cumulative impact by separately focusing on isolated parts of the whole." *Id.* (citations omitted).

143. *Id.* at 444. Had the Board included a plan for disposing of the waste it necessarily would have to prepare an environmental impact report regarding the plan. The court found that the Board would eventually have to adopt a plan for the disposal and, thus, could not break up the project by separating the acquisition from the disposal plan. *Id.*

144. *Id.*

145. *Id.* at 445.

146. *Id.* at 447.

147. *Id.* (citing *Bozung*, 529 P.2d at 1035).

argument reaches the courtroom. Unfortunately, the legislature must amend the statute to more efficiently prevent the institution of actions based on non-environmental concerns. While previous amendments to the California statute codified judicial interpretations of CEQA, sister states' statutes may provide competent methods of attaining greater proficiency in the implementation of CEQA.

## IV. COMPARATIVE STATE POLICIES

All the states adopting environmental policy acts modeled their statutes after NEPA, the federal environmental act.[148] Moreover, states that adopted the policies of earlier statutes incorporated the successes and avoided the failures attributed to the prior statutes. While recent state statutes encompass the experiences of early environmental policies, such as those in California, California and other pioneer states need to investigate the results of sister states' interpretations and incorporate the beneficial experiences into their individual statutes. Even though states have competing concerns in much of their legislation, these same states consistently and systematically derive similar substantive goals in their environmental policy acts. Since New York's State Environmental Quality Review Act (SEQRA) and Washington's State Environmental Policy Act (SEPA) generate the most litigation and support, this article will analyze the two statutes and the strengths that could enhance CEQA's support.

### *A. New York*

New York's SEQRA became effective on November 1, 1978, roughly eight years after the adoption of NEPA, California's CEQA, and Washington's SEPA.[149] By this time, Congress and the legislatures of California and Washington had worked out the initial rough areas in their respective statutes. In fact, California had already amended CEQA once.[150] This allowed New York the opportunity to bypass some trial and error in their initial document.[151] Therefore,

148. MANDELKER, *supra* note 16, § 12:01.

149. *Id.* § 12:04.

150. Nicholas A. Robinson, *SEQRA's Siblings: Precedents From Little NEPA's in the Sister States*, 46 ALBANY L. REV. 1155, 1160 (1982).

151. *See* Koppell, *Environmental Protection Laws At Issue*, N.Y.L.J., May 6, 1976 at 1. Assemblyman Oliver Koppel, chairman of the New York State Assembly Environmental Conservation Committee, solicited reports from sister state officials including Nicholas Yost, chief at the California Office of Environmental Protection. Yost concluded that CEQA enjoyed early success and that the noted fears of increased litigation never surfaced nor did the fear of delaying projects for unnecessary reasons. *Id.* at 4. Koppel concluded that

> we do have substantial information in the experience of California, a state which has had such a law since 1970. The states (California and New York) have much in common, apart from the fact that much of the New York act is

New York adopted its statute with reference to other state experiences, but adapted the document to the peculiar needs of New York. Likewise, by reviewing SEQRA and applying its provisions to the critical needs of CEQA, the California legislature could improve CEQA's functional efficiency.

1. To what types of projects does SEQRA apply?

Following the lead of CEQA, the New York legislature established that SEQRA applies to any action that a state or local agency proposes or approves.[152] The project need not fall in the high threshold category as adopted by NEPA.[153] Rather, SEQRA applies to any pro-

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patterned on the earlier California model. Both states are large, populous and diverse.

*Id.* at 1.

In a separate opinion, Philip Weinberg, the head of the Environmental Protection Bureau in the New York State Attorney General's Office, commented on the initiation of SEQRA:

> SEQRA had as its model [NEPA], which since January 1, 1970 has required every federal agency performing, permitting or funding any major action with a substantial impact on the environment to weigh the environmental effects of its action and to prepare an environmental impact statement—to look, in short, before it leaps, or permits someone else to. Even more in point, a number of states, notably California and Washington, had also enacted environmental impact laws with parallel mandates. Our Legislature adapted these laws to New York's needs, requiring the state, localities and private businesses acting under state or local permit or funding to consider the impact of their action on the environment and to document that consideration by furnishing a reviewable record.

Robinson, *supra* note 150, at 1161 (citing Philip Weinberg, *What Every Real Estate Lawyer Should Know About New York's SEQRA*, 52 N.Y.S.B.J. 110 (1977)).

152. N.Y. ENVTL. CONSERV. LAW § 8-0105(4). The statute reads:

> Actions include:
> (i) projects or activities directly undertaken by any agency; or projects or activities supported in whole or in part through contracts, grants, subsidies, loans, or other forms of funding assistance from one or more agencies; or projects or activities involving the issuance to a person of a lease, permit license, certificate or other entitlement for use or permission to act by one or more agencies;
> (ii) policy, regulations and procedure-making.
> The statute also includes activities which are not considered actions;
> Actions do not include;
> (i) enforcement proceedings or the exercise of prosecutorial discretion in determining whether or not to institute such proceedings;
> (ii) official acts of a ministerial nature, involving no exercise of discretion;
> (iii) maintenance or repair involving no substantial changes in existing structure or facility.

*Id.* at § 8-0105(5).

153. NEPA applies to *major* projects undertaken by the federal government. 42 U.S.C. § 102(2)(c) (West 1992). Some courts interpreted the language "major" to be synonymous with "significance," thereby downplaying the importance of major projects. *See* Minnesota Pub. Interest Research Group v. Butz, 498 F.2d 1314 (8th Cir. 1974).

ject which a government agency undertakes or approves. Therefore, as set forth in California's *Friends of Mammoth*, SEQRA applies to all public projects, as well as private projects, which sought approval from a government agency.[154]

Straying from the California statute, the New York legislature expanded on CEQA's concept of "projects" by explicitly defining and categorizing types of projects subject to, or not subject to, an environmental impact statement.[155] The New York State Department of Environmental Conservation proffered these definitions in a body of regulations similar to the CEQA Guidelines.[156] The detailed discussion of "projects" helps temper the burdensome task of a significance determination and the inconsistency involved when attempting to grasp a meaningful definition of significance.[157]

While California merely lists various exemptions to CEQA,[158] SEQRA groups projects into several categories: Type I,[159] Type II,[160] unlisted,[161] exempted[162] and excluded.[163] Each category requires a different level of review according to its potential effects on the environment. An agency must presume that a Type I action will definitely have a significant impact on the environment.[164] Type II

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Other courts apply a divided and narrower interpretation. *See* National Ass'n for the Advancement of Colored People v. Medical Center, Inc., 584 F.2d 619 (3rd Cir. 1978).

154. N.Y. ENVTL. CONSERV. LAW § 8-105(4)(ii).

155. N.Y. COMP. CODE R. & REGS. tit. 6, § 617.12 (1987). These regulations also expand the statutory definition of a project. *Id.* § 617.2(b).

156. *See* N.Y. CONSERV. LAW § 8-0113 (authorizing the Department of Environmental Conservation to adopt SEQRA rules and regulations).

157. *See infra* notes 310-321 and accompanying text (recommendations for narrowing the project determination).

158. *See supra* notes 27-30 and accompanying text (discussion of California project determination).

159. N.Y. COMP. CODE R. & REGS. tit. 6, § 617.12.

160. *Id.* § 617.13.

161. Unlisted actions obviously do not have a definitional category, but the regulations refer to them in Section 617.12. *Id.* § 617.12.

162. *Id.* § 617.2(q). The statute also defines exempt actions as non-actions. N.Y. ENVTL. CONSERV. LAW § 8-105(5). *See supra* note 152.

163. N.Y. COMP. CODE R. & REGS. tit. 6, § 617.2¶. Excluded actions include projects started before the initiation of SEQRA, actions under which the Public Services Law already pertain, and actions undertaken by the Adirondack Park Agency. *Id.* An agency treats both the excluded actions and exemptions the same as a Type II action.

164. Section 617.12(b) lists Type I actions, but the list is not inclusive. Type I actions include:

(1) the adoption of a municipality's land use plan, the adoption by any agency of a comprehensive resource management plan or the initial adoption of a municipality's comprehensive zoning regulations;
(2) the adoption of changes in the allowable uses within any zoning district, affecting 25 or more acres;
(3) the granting of a zoning change, at the request of an applicant, for an action that meets or exceeds one or more of the thresholds given elsewhere in this list;
(4) the acquisition, sale, lease, annexation or other transfer of 100 or more contiguous acres of land by a State or local agency;

actions will absolutely not have an impact on the environment and

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(5) construction of new residential units which meet or exceed the following thresholds;
(i) 10 units in municipalities which have not adopted zoning or subdivision regulations;
(ii) 50 units not to be connected (at commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works;
(iii) in a city, town or village having a population of less than 150,000: 250 units to be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works;
(iv) in a city, town or village having a population of greater than 150,000 but less than 1,000,000: 1000 units to be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works; or
(v) in a city, town or village having a population of greater than 1,000,000: 2,500 units to be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works;

(6) activities, other than the construction of residential facilities, which meet or exceed any of the following thresholds; or the expansion of existing non-residential facilities by more than 50 percent of any of the following thresholds:
(i) a project or action which involves the physical alteration of 10 acres;
(ii) a project or action which would use ground or surface water in excess of 2,000,000 gallons per day;
(iii) parking for 1,000 vehicles;
(iv) in a city, town or village having a population of 150,000 persons or less: a facility with more than 100,000 square feet of gross floor area;
(v) in a city, town or village having a population of more than 150,000 persons: a facility with more than 240,000 square feet of gross floor area;

(7) any structure exceeding 100 feet above original ground level in a locality without any zoning regulation pertaining to height;

(8) any non-agricultural use occurring wholly or partially within an agricultural district (certified pursuant to Agriculture and Markets law, article 25, section 303 and 304) which exceeds 25 percent of any threshold established in this section;

(9) any Unlisted action (unless the action is designed for the preservation of the facility or site) occurring wholly or partially within, or substantially contiguous to, any historic building, structure, facility, site or district or prehistoric site that is listed on the National Register of Historic Places, or that has been proposed by the New York State Board on Historic Preservation for a recommendation to the state Historic Preservation Officer for nomination for inclusion in said National Register, or that is listed on the State Register of Historic Places (The National Register of Historic Places is established by 36 Code of Federal Regulations (C.F.R.) Parts 60 and 63, 1986 (see section 617.19 of this Part).);

(10) any Unlisted action which exceeds 25 percent of any threshold in this section, occurring wholly or partially within or substantially contiguous to any publicly owned or operated parkland, recreation area or designated open space, including any site on the Register of National Natural Landmarks pursuant to 36 C.F.R. Part 62, 1986 (see section 617.19 of this Part);

(11) any Unlisted action which exceeds a Type I threshold established by an involved agency pursuant to section 617.4 of this Part; or

fall outside the scope of SEQRA.[165] The same treatment applies to exempted and excluded activities.[166] Unlisted actions require a substantive review, but carry no presumption of significance, as in a Type I action.[167]

The legislature designed SEQRA to register the environmental effects of an agency action as early as possible in the "formulation of an action it proposes to undertake, or as soon as [the agency] receives an application for funding or approval action."[168] An agency must first determine the classification of a proposed project. The regulations recognize that agencies internally categorize projects.[169] If the agency finds that a project proposed by a private party or the agency itself falls under the Type II, exempted, or excluded list, SEQRA will not apply.[170] Thus, the agency may approve the project without ref-

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(12) any Unlisted action which takes place wholly or partially within or substantially contiguous to any critical environmental area designated by a local or state agency pursuant to section 617.4(h) of this Part.

*Id.* § 617.12(b).

165. *Id.* § 617.13.

166. *Id.* § 617.11.

167. *Id.* § 617.12(a). Type I actions are more likely to require an environmental impact statement than is an unlisted action. Furthermore, a Type II listed action requires a long Environmental Assessment Form (EAF), while an unlisted action requires a short EAF.

> The EAFs are widely used to provide the information upon which initial determination of significance are based. The full EAF is a 13-page document that requires more detail than required by the short form, which is a two page document. The regulations expressly require that a full EAF be used to ascertain the significance of all Type I actions, unless a draft EIS has been prepared and submitted on the action by the project sponsor. *Id.* § 617.5(b). Similarly, the short form EAF is generally to be used for unlisted actions. *Id.* § 617.5(c). In this case, however, agencies are granted discretion to require the full EAF if necessary to obtain enough information to make a determination of significance. *Id.*

Peter R. Paden, *DEC's Part 617 Regulations, As Amended: A Guide to the Implementation of SEQRA*, 5 PACE ENVTL. L. REV. 51, 64 n.66 (1987).

168. N.Y. COMP. CODE RULES & REGS. tit. 6, § 617.5(a): *compare with* CAL. CODE REGS. tit. 14, § 15013 ("EIRs should be prepared as early in the planning process as possible to enable environmental considerations to influence project, program or design.").

169. *Id.* § 617.12(a)(2). The regulations also give local agencies the power to designate areas as Critical Environmental Areas (CEA). *Id.* § 617.4(h). The designation skirts a formal listing of a project as a Type I action and requires "a presumption in favor of a more searching SEQRA review for any action proposed within its bounds." Paden, *supra* note 167, at 71. The regulation provides certain guidelines for a locality to make such a designation:

> To be designated a CEA, an area must be exceptional or unique as to one or more of the factors set forth in § 617.4(h). These factors include:
>
> (i) a benefit or threat to human health;
>
> (ii) a natural setting (e.g. fish and wildlife habitat, forest and vegetation, open space and areas of important aesthetic or scenic quality);
>
> (iii) social, cultural, historic, archaeological, recreational, or educational values; or
>
> (iv) an inherent ecological, geological or hydrological sensitivity to change which may be adversely affected by any change.

N.Y. COMP. CODE R. & REGS. tit. 6, § 617.4(h).

170. *Id.* § 617.5(a)(1).

erence to the environmental concerns outlined in SEQRA. When an agency determines that an action falls under the Type I description, then a high likelihood exists that a significant impact will occur upon its approval, and thus an agency must require or prepare an environmental impact statement.[171]

While the categorizing of projects seems time-consuming and cumbersome, it promotes environmental concerns and provides consistency and predictability to agencies and private parties preparing to embark on a project that needs governmental approval.[172] Accordingly, the legislature's extra effort curtails needless litigation, delays, and costs incurred by agencies and private parties alike. For instance, a developer can refer to the statute and sufficiently plan the type of development he wishes to pursue and more accurately determine the possible costs and time constraints involved.

2. Significance determination and its consequences

The New York statute again follows the lead of CEQA when defining "significant effect." SEQRA requires that an agency prepare an environmental impact statement on any action "which *may* have a significant effect on the environment."[173] Certain definitions help minimize the arbitrary determination of significance.[174] The definition of "environment" in SEQRA, as well as the project definitions, mitigate the challenging significance determination. SEQRA defines the environment as "the *physical* conditions which will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance, visiting patterns of population, concentration, distribution, or growth and existing community or neighborhood character."[175] Thus, the physical environment, as well as socioeconomic effects of an action, need attention.

New York's highest court solidified this interpretation in *Chinese Staff & Workers Association v. City of New York*.[176] In that case, the court reviewed a negative declaration determination by two lead agencies, the City Planning Commission and the Board of Esti-

171. *Id.* § 617.12(a)(1).
172. *See generally* Paden, *supra* note 167, at 71-77.
173. N.Y. ENVTL. CONSERV. LAW § 8-0109(2).
174. *See supra* notes 152-172 and accompanying text (New York project determination).
175. N.Y. ENVTL. CONSERV. LAW § 8-0105(6) (emphasis added). The definition seems to include many areas tested by litigation in California and Washington.
176. 502 N.E.2d 176 (N.Y. 1986).

mate.[177] The agencies decided that a proposed high-rise luxury apartment building in New York City's Chinatown would not have a significant effect on the environment.[178] The case turned on the precise definition of "environment." The court determined that SEQRA's definition included socioeconomic effects affecting the community character and population patterns of the area.[179] More importantly, it held that these socioeconomic effects alone substantiated the need for an environmental impact statement, notwithstanding the lack of an actual impact on the *physical* environment.[180]

An agency arrives at a significance determination through an elaborate, but well-defined procedural method.[181] As discussed above, the agency must first categorize the type of action.[182] When the agency determines that a project falls under the Type I or unlisted action category, it must complete a preliminary Environmental Assessment Form.[183] The agency will use this form to make its initial significance determination.[184] If the agency finds that the proposed action might have a significant effect on the environment as provided by the detailed definitions in the statutes and regulations, then the agency must prepare an environmental impact statement.[185]

The New York Supreme Court, in *H.O.M.E.S. v. New York State Urban Development Corp.*,[186] set the initial standards of review that an agency must consider when determining significance. In *H.O.M.E.S.*, the city planning commission determined that it need not prepare an environmental impact statement on a proposed domed athletic facility on the Syracuse University campus.[187] Opponents argued that the new stadium would have a profound effect on traffic and parking problems in the area.[188] The court rejected the agency's determination of non-significance and articulated the standard that an agency must meet in making such a determination.[189]

The court looked to the federal NEPA standard in adopting the "hard look" test.[190] Under this test, the agency must 1) identify rele-

177. *Id.* at 177.
178. *Id.*
179. *Id.* at 180. *See also* Real Estate Board of New York, Inc. v. City of New York, 556 N.Y.S.2d 853, 854 (N.Y. App. Div. 1990).
180. *Chinese Staff*, 502 N.E. 2d at 180.
181. *See* N.Y. COMP. CODE R. & REGS. tit. 6, § 617.11(a).
182. *See supra* notes 152-172 and accompanying text (New York project determination and defining the Environmental Assessment Form).
183. N.Y. COMP. CODE R. & REGS. tit. 6, § 617.21. *See supra* note 167.
184. Paden, *supra* note 167, at 64 n.66.
185. *Id.* at 63-64 n.66.
186. 418 N.Y.S.2d 827 (N.Y. App. Div. 1979).
187. *Id.* at 829.
188. *Id.*
189. *Id.* at 832.
190. *Id.* The court relied on the NEPA standard coined in the opinions of Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976); City of Rochester v. U.S. Postal Serv., 541

vant areas of environmental concern, 2) thoroughly analyze those areas to determine if the action may have a significant adverse impact, and 3) support its determination with reasoned elaboration before making a negative declaration.[191] The decision asserts that all government agencies act as "stewards" of the environment in making their decisions.[192]

Similar to the definitional problems faced by the California courts, subsequent decisions in New York met with confusion as to the application of the *H.O.M.E.S.* standard.[193] Some courts felt that the test required the court to consider only the procedural aspects of an agency's decision.[194] Other courts demanded a more intrusive probe into the substantive issues to assure that the agency applied the "hard look" test.[195] The New York Court of Appeals evidently provided the appropriate standard whereby the court may look into substantive issues facing the agency under the arbitrary and capricious standard of review. However, other courts found that *H.O.M.E.S.* implied a more relaxed standard by holding that the "rule of reason" applies to agency decisions because they have wide decisional latitude as stewards of the environment.[196] While the *H.O.M.E.S.* decision applied to the adequacy of an environmental impact statement, it also implied that the "hard look" test applies when determining whether the agency must prepare the statement at all.[197] Thus, a court might reject a negative declaration if substantial evidence existed that the agency issued the declaration arbitrarily and capriciously.[198]

New York's standard highlights the confusion inherent in a signifi-

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F.2d 967, 973 (2d Cir. 1976), and Maryland-National Capital Park and Planning Comm'n v. U.S. Postal Serv., 487 F.2d 1029, 1040 (D.C. Cir. 1973).

191. *H.O.M.E.S.*, 418 N.Y.S.2d at 832. The negative declaration may demand mitigating measures which a project must satisfy. In other words, the agency issues a conditional negative declaration. See N.Y. COMP. CODE R. & REG. § 617.6(h).

192. *H.O.M.E.S.*, 418 N.Y.S.2d at 830.

193. *See* Gail Bowers, *New York's SEQRA in the Courts*, 5 PACE ENVTL. L. REV. 25, 30-32 (1987).

194. *See* Southampton Ass'n v. Planning Board, 491 N.Y.S.2d 388 (N.Y. App. Div. 1985) (upholding a plat approval); Soule v. Town of Colonie, 464 N.Y.S.2d 576, 579 (N.Y. App. Div. 1983) (upholding a negative declaration for a municipal sports stadium); Cohalan v. Carey, 452 N.Y.S.2d 639 (N.Y. App. Div. 1982), *appeal dismissed*, 439 N.E.2d 886 (N.Y. 1982) (upholding conversion to a correctional facility).

195. *See* Aldrich v. Pattison, 486 N.Y.S.2d 23 (N.Y. App. Div. 1985); Inland Vale Farm Co. v. Stergianopolous, 478 N.Y.S.2d 926 (N.Y. App. Div. 1984), *aff'd*, 481 N.E.2d 547 (N.Y. 1985) (denying a negative declaration because it merely identified the environmental concerns rather than taking a "hard look").

196. Jackson v. New York State Urban Dev. Corp., 494 N.E.2d 429, 436 (N.Y. 1986).

197. *Id.* The court implied this by affirming a lower court's decision in *Aldrich*.

198. *Jackson*, 494 N.E.2d at 267.

cance determination. In fact, not all New York courts have consistently interpreted the *H.O.M.E.S.* standard of review.[199] This inconsistency allows courts to determine significance on a purely biased view. What might or might not have an effect on the environment depends on many speculative factors, including cumulative effects and future project considerations not yet ascertained.[200] Thus, one court might feel that a project has significance while another will view the same project as non-significant.

### *B. Washington*

While New York's statute obtained relative sophistication in its project determination, Washington successfully prioritized its substantive policies over its policies that promote procedural exhaustion. SEPA grants increased substantive power to the state and local agencies at the cost of procedural exactitude. One author noted that the statute

> is short on process, long on substance. It is inattentive to high standards of articulation in the statements, receptive to avoid-the-paperwork and exhaust-proper-channels arguments. At the same time, it focuses upon results and is unwilling to accept procedural generosity as a fair tradeoff for a polluted stream. Slick statements are no substitutes for clean water. Washington will be best known as the state whose SEPA elevates substance over form."[201]

Even though the Washington statute sacrifices procedural intricacies in return for increased substantive agency power, that increased power provides for a more efficient statute by creating greater consistency and predictability, and by eliminating the undue pressure that adversarial groups exert on project sponsors. Furthermore, the act's cursory procedural framework also alleviates some unnecessary disputes.

#### 1. The procedural policies

Like California, Washington initiated its environmental policy shortly after NEPA's introduction.[202] Consequently, the Washington legislature largely based its procedural methods on the federal NEPA,[203] rather than instituting a more expansive document as did

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199. *See supra* notes 193-197 and accompanying text.

200. *See, e.g., Jackson*, 494 N.E.2d at 429; Chinese Staff & Workers Ass'n v. City of New York, 502 N.E.2d 176 (N.Y. 1986); Programming and Sys. Inc. v. New York State Urban Dev. Corp., 460 N.E.2d 1347 (N.Y. 1984) (no EIS needed until specific project planned).

201. William H. Rodgers, Jr., *The Washington Environmental Policy Act*, 60 WASH. L. REV. 33, 68 (1984).

202. The statute's short title is the "State Environmental Policy Act of 1971" (SEPA). WASH. REV. CODE ANN. § 43.21C.900 (West 1983).

203. *See supra* notes 14-23 and accompanying text; *see also* MANDELKER, *supra* note 16, § 12:05.

California[204] and New York.[205] Thus, SEPA requires an environmental impact statement "on proposals for legislation and other *major* actions having a probable significant, adverse effect."[206]

SEPA, unlike the California and New York statutes, applies to *major* projects.[207] Unfortunately, the statute fails to define what constitutes a major project. However, the legislature has generally categorized a project as an internal agency proposal or private parties' proposals which need agency approval.[208] This varies from the more narrow NEPA definition which considers only federal agency projects.[209] Therefore, while the Washington legislature gives its courts some latitude to define the boundaries of a major project, it provides less latitude than the California and New York legislatures have given their courts.[210]

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204. *See supra* notes 25-46 and accompanying text (entire discussion of California statute).

205. *See supra* notes 149-200 and accompanying text (entire discussion of New York).

206. WASH. REV. CODE ANN. § 43.21C.031 (Supp. 1991) (emphasis added).

207. *Id.*

208. The interpretation follows largely from the language in Section 43.21C.020(3) stating that "each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment." *Id.* § 43.21C.020(3). The Department of Ecology, which published a set of SEPA rules known as the "green book," codified this interpretation. *See* WASH. ADMIN. CODE § 197-11-714 (1989). SEPA gives the Department of Ecology the power to establish "rules of interpretation and implementation" to which an agency must give "substantial deference." WASH. REV. CODE ANN. § 43.21C.095. *See also* Leschi Improvement Council v. Washington State Highway Comm'n, 525 P.2d 774 (Wash. 1974).

209. *See supra* note 17-19 and accompanying text (NEPA generally applies to major projects).

210. *See* Norway Hill Preservation and Protection Ass'n v. King County Council, 552 P.2d 674 (Wash. 1976). The court in *Norway Hill*, suggesting the appropriate standard of review, artfully stated that

> [i]n order to achieve this public policy it is important that an environmental impact statement be prepared in all appropriate cases. As a result, the initial determination by the 'responsible official,' . . . as to whether the action is a 'major action [ ] significantly affecting the environment' is very important. The policy of the act, which is simply to ensure via a 'detailed statement' the full disclosure of environmental information so that environmental matters can be given proper consideration during decision making, is thwarted whenever an incorrect 'threshold determination' is made. The determination that an action is not a 'major action significantly affecting the quality of the environment' means that the detailed impact statement of SEQA is not required before the action is taken or the decision is made. Consequently, 'without a judicial check, the temptation would be to short-circuit the process by setting statement thresholds as high as possible within the vague bounds of the arbitrary or capricious standard.'

*Id.* at 677-78 (citations omitted).

SEPA's significance standard more precisely follows the NEPA definition[211] than the definitions adhered to by the California and New York statutes. Thus, the act applies to major projects that have a "significant effect" on the environment.[212] The Washington statute purposefully omits specific language indicating that it governs projects which *might* significantly affect the environment. Subsequently, the Washington Supreme Court, in *Norway Hill Preservation and Protection Association v. King County Council*,[213] attempted to give SEPA a more interpretative definition. The court stated that a "precise and workable definition [of significance] is elusive because judgments in this area are particularly subjective—what to one person may constitute a significant or adverse effect on the quality of the environment may be of little or no consequences to another." Thus, the court avoided a "value-laden definition of 'significantly.' "[214] However, the court did provide a more general guideline, establishing that "the procedural requirements of SEPA . . . should be invoked whenever more than a moderate effect on the quality of the environment is a reasonable probability."[215] This definition contrasts with the New York and California definitions where the legislatures and the courts have interpreted the significance standard to include speculative potential effects.

Adherence to the federal definitions of a major project and of a significance determination sufficiently narrows the applicability of SEPA by precluding agency determinations on speculative and insubstantial projects.[216] Thus, an agency decides only on major projects that will have a significant effect on the environment. Moreover, combining New York's intricate categorization of projects with the narrow application of significance helps filter out litigious opponents of development.[217] Nevertheless, like California's CEQA, SEPA's

211. WASH. REV. CODE ANN. § 43.21C.031.

212. In 1983, the Department of Ecology provided a more precise definition of environment to assist in significance determinations. It provides that the environment consists of both the natural and the built environment. The built environment includes "public services and utilities (such as water, sewer, schools, and fire and police protection), transportation, environmental health (such as explosive materials and toxic waste), and land and shoreline use (including housing, and a description of relationships with land use and shoreline plans and designations including population)." WASH. REV. CODE ANN. § 43.21C.110(f).

213. 552 P.2d 674 (Wash. 1976).

214. *Id.* at 680.

215. *Id.* The court decided whether the development of a suburban neighborhood in a heavily wooded area would have a significant effect on the environment. The court concluded that the project "on its face" would have a significant effect on the environment. *Id.* at 680-81.

The significance determination works in concert with the judicial standard of review discussed *infra* at notes 232-41 and accompanying text.

216. *See* Rodgers, *supra* note 201, at 36. *See supra* note 153 (explaining federal court interpretation of major projects).

217. *See supra* notes 159-72.

procedural structure leaves an opening, albeit narrower than CEQA's, to widespread attack. The focus on its substantive policies, though, alleviates the onslaught by giving the lead agency increased power.

2. The substantive policies

The focus of an agency's substantive power under SEPA surfaces in the agency's ability to deny a proposal for environmental concerns alone.[218] California agencies have not developed practically tested substantive authority, and instead use a heightened procedural check through mitigation and overriding considerations.[219] Although the Washington judiciary reviews an agency's power with a higher level of scrutiny,[220] the agency's authority to deny a proposal compels a project sponsor to seriously address environmental concerns and intellectually create mitigating and alternative measures. Therefore, if the agency denies the project without predicated factual circumstances, the clearly erroneous standard of review provides the sponsor with an adequate remedy.[221]

The Washington Supreme Court addressed the issue of agency denials in *Polygon Corporation v. City of Seattle*.[222] In *Polygon*, the City of Seattle denied Polygon's application for a building permit because of the project's possible negative aesthetic impact on the environment.[223] Polygon asserted that the City did not have the authority to deny the building permit.[224] The court disagreed.[225]

The *Polygon* court, interpreting SEPA, opined that to limit the

218. *See* Polygon Corp. v. City of Seattle, 578 P.2d 1309, 1312 (Wash. 1978) (interpreting WASH. REV. CODE ANN. 43.21C.030(2)(b) as giving an agency the authority to deny a proposal on environmental concerns alone). The pertinent statute requires that in order for an agency to issue a denial, it must find "(1) The proposal would result in significant adverse impacts identified in a final or supplemental environmental impact statement prepared under this chapter; and (2) reasonable mitigation measures are insufficient to mitigate the identified impact." WASH. REV. CODE ANN. § 43.21C.060.

219. *See supra* notes 36-37 and accompanying text.

220. *Polygon*, 578 P.2d at 1314. The clearly erroneous standard allows for a broader review than the arbitrary and capricious standard. *Id.*

221. *Id.*

222. 578 P.2d 1309 (Wash. 1978).

223. *Id.* at 1311. The City found that the project "would have a number of adverse environmental impacts of varied significance including, among others, view obstruction, excessive bulk and excessive relative scale, increases in traffic and noise, and shadow effect . . . . The most significant impact was *visual* . . . ." *Id.* (emphasis added).

224. *Id.* at 1312. Polygon contended that procedurally SEPA "serves only an 'informational' purpose and does not confer substantive authority [for an agency] to act with reference to the environmental impacts disclosed." *Id.*

225. *Id.*

agency to procedural scrutiny of the statute would nullify the actual policy of the document.[226] Consequently, it noted that SEPA's policy "mandates" that an agency substantively review and decide on proposals affecting the environment.[227] This changes a previously ministerial agency decision—the issuance of a building permit under the appropriate zoning ordinances—to a discretionary, legislative decision on environmental impact considerations.[228] Furthermore, the court stated that SEPA authority shall "overlay" existing powers of state and local agencies.[229] In other words, agency authority granted prior to SEPA's enactment will not supplant SEPA's environmental concerns.[230] Rather, SEPA's policies and goals supplement the existing power of government agencies.[231]

Along with statutory limitations,[232] the judiciary maintains a broad

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226. *Id.* The relevant statute read that "all branches of government of this state . . . will insure that presently unquantified environmental amenities and values will be given appropriate consideration in decision making. . . ." WASH. REV. CODE ANN. § 43.21C.030(2)(b).

227. *Polygon*, 578 P.2d at 1312.

228. *Id. Cf.* Friends of Westwood, Inc. v. City of Los Angeles, 235 Cal. Rptr. 788, 794-95 (Cal. Ct. App. 1987) (issuing a building permit is ministerial unless the agency retains some discretionary authority). Generally, building permits exemplify ministerial projects. CAL. CODE REGS. tit. 14, § 15268(b)(1).

229. *Polygon*, 578 P.2d at 1313. (citing Sisley v. San Juan County, 569 P.2d 712 (Wash. 1977)). *See supra* note 12.

230. *Polygon*, 578 P.2d at 1313.

231. *Id. See* WASH. REV. CODE ANN. § 43.21C.060. Amendments to this statute temper the scope of the legislative power. The statute now states that any denial by a government agency must result from policies existing at the time of the denial. The agency shall base any "conditions or denials . . . upon policies identified by the appropriate governmental authority and *incorporated* into regulations, plans, or codes which are *formally designated* by the agency (or appropriate legislative body, in the case of local government) as possible bases for the exercise of authority pursuant to this chapter." *Id.* (emphasis added). One author noted the uncertainty of this limitation:

> "This ultimate power to disapprove [i.e., denials by the agency] is clearly sanctioned by the Washington SEPA although project losers are protected by some uncertain process rights . . . . [Section 43.21C.060] is either a strict rulemaking requirement, in which event it will be rarely complied with, or a loose notice provision, in which event it will be routinely complied with. The reason that a strict rulemaking precondition would be largely fatal to substantive SEPA is that inventing detailed before-the-fact specifications for *sui generis* conflict is an unproductive enterprise, especially for busy decisionmakers who are obliged to respond to problems of the moment at the expense of big picture rulemaking. If a detailed rule is the sine qua non of a project denial, it won't happen."

Rodgers, *supra* note 201, at 61-62.

Nevertheless, the Washington Supreme Court has reversed agency denials without appropriate authority. *See* Cougar Mountain Assoc. v. King County, 765 P.2d 264 (Wash. 1988) (reversal of a denied subdivision application); Victoria Tower Partnership v. City of Seattle, 745 P.2d 1328 (Wash. Ct. App. 1987) (remanding a building permit denial). *See generally* Roger Pearce, Comment, *Death by SEPA: Substantive Denials Under Washington's State Environmental Policy Act*, 14 U. PUGET SOUND L. REV. 143 (1990) (excellent discussion of substantive policies under SEPA).

232. *See supra* note 231 and accompanying text.

check on legislative substantive power.[233] In order to compensate for potential abuses of agency power, the judiciary conducts a clearly erroneous standard of review.[234] The Washington Supreme Court adopted this standard of review in *Norway Hill* and affirmed its application to substantive denials in *Polygon*.

The clearly erroneous standard demands that the court review *all* the evidence leading to an agency's decision.[235] This differs from the arbitrary and capricious standard which requires the court to look for substantial evidence to justify an agency's significance determination.[236] Furthermore, the clearly erroneous standard also includes a review of the public policy envisioned by SEPA.[237] In practice, this provides a judicial check on the subjective decision-making process of a particular agency.[238] While "[t]he court does not substitute its judgment for that of the administrative body," it will, upon full judicial review of the entire record, "find the decision 'clearly erroneous' only when it is left with the definite and firm conviction that a mistake has been committed."[239]

Not only does the clearly erroneous standard of review police an agency's responsibility and abuse of discretion, but it also alerts the project sponsor that his proposal must conform to SEPA standards.[240] If he fails to consider the Washington statute and decides to challenge an agency denial, the challenge will fail, provided the agency has not made a fatal mistake.[241] Thus, progressive substantive policies encourage the project sponsor to pay homage to the details discussed in SEPA. In contrast to CEQA, this results in a more efficient statutory procedure for all parties involved.

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233. *See* Norway Hill Preservation and Protection Ass'n v. King County Council, 552 P.2d 674, 678-80 (Wash. 1976).

234. *Id.* at 678. The *Norway Hill* decision applies the clearly erroneous standard to negative threshold decisions. *Id. See also Polygon*, 578 P.2d at 1314 (application to agency denials).

235. *Norway Hill*, 552 P.2d at 678 (citations omitted).

236. *Id.* (citations omitted).

237. *Id.* at 678-79. (citations omitted).

238. *Polygon*, 578 P.2d at 1314. One commentator suggests that "agency decisions are often made in an atmosphere of intense political pressure, which is conducive to abuse of discretion." Pearce, *supra* note 231, at 170-71 (citing Polygon, 578 P.2d at 1314-15).

239. *Polygon*, 578 P.2d at 1315.

240. *See* Rodgers, *supra* note 201, at 40-43.

241. *Id.*

## V. AN EMPIRICAL STUDY OF CEQA

While CEQA envisions noble policy goals, extremist environmental groups and citizens opposed to development in their neighborhoods ("not-in-my-backyard" groups) abuse CEQA's youth and confusion in order to prevent or delay potential development projects. An environmental impact report should correctly address the issues concerned with the significance of adverse environmental effects, possible mitigation measures, alternatives, cumulative impacts and actual (as opposed to speculative) future projects. In reality, CEQA's process encourages adversarial groups to harass development project sponsors for reasons other than environmental concerns.[242] These groups find support from the *No Oil* fair argument test as well as the redefined public controversy test.[243] Not only must parties speculate on the actual need for an impact report, but they must also speculate on what they must provide within the report to avoid the inconsistency of the judiciary.[244] The adage "better safe than sorry" becomes a reality when agencies or their consultants draft increasingly more thorough documents which cover irrelevant material.[245] At the time, these drafts seem necessary to avoid possible litigation even though the preparation substantially increases costs and sometimes delays projects indefinitely.[246] The project developers pass the added costs on to the consumer through increased real estate prices,[247] landfill fees (costs associated with trash dumping and pick-ups), timber prices and mineral commodity prices (not necessarily well-known minerals, but those used in soaps, deodorants and other necessities).[248] This system, coupled with impact reports needing revision and final approval,[249] delineates the oft-noted bureaucratic inefficiency.

A good illustration of how a party might delay a proposed project

242. *See infra* notes 250-65 and accompanying text (empirical study of CEQA).

243. *See supra* notes 89-91 and accompanying text. Although the courts and the Office of Planning and Research sufficiently narrowed the public controversy test, the Guidelines, nevertheless, would find a public controversy in marginal cases when experts differ on the significant impact. CAL. CODE REGS. tit. 14, § 15064(h)(2). *See also* Citizen Action to Serve All Students v. Thornley, 272 Cal. Rptr. 83, 90-91 (Cal. Ct. App. 1990) (disagreement among experts give rise to a significant impact in marginal cases). In some cases, project opponents can manipulate the nebulous significance determination to create a marginal case, then pay the appropriate expert to argue their position.

244. *See* Selmi, *supra* note 27, at 214-15.

245. *See* Weiss, *supra* note 2 ("[E]nvironmental impact reports have evolved into bloated, unwieldy documents that run up construction costs, entice troublemaking lawsuits and cause unnecessary delay.").

246. *See* C. Duerksen, *Dow vs. California:* A TURNING POINT IN THE ENVIROBUSINESS STRUGGLE (1982) (historical perspective of Dow Chemical's infamous CEQA problems of a proposed chemical production plant).

247. Jube Shiver Jr., *Home Builders Seek a Cutback in Regulation*, L.A. TIMES, Sept. 3, 1991, at B1.

248. Interview with Pat Mitchell, *supra* note 40.

249. CAL. CODE REGS. tit. 14, §§ 15064-90, 15160-63.

comes from an actual study of an environmental impact report and the subsequent comments submitted to the project sponsor by the opposing party.[250] Recently a development group prepared an environmental impact report on a proposed residential development near a mining company's operations area.[251] The mining group opposed the development for fear of subsequent public outcry about mining operations near the residential project.[252] They hired a private consultant to fight the project in the public hearings held to determine if the project would have a significant effect on the environment.[253]

Following the public hearing, the Community Development Department found that public controversy required an environmental impact report.[254] The report had to address issues raised in a Notice of Preparation (Notice). Once the sponsor circulated the report, the hired consultant scrutinized the index of the report to see if the report conformed to the Notice. Inevitably, the consultant found errors in the report's discussion of aesthetic value, consideration of biological damage, and land use provisions.[255] The consultant scoured the report for any missing technicality to encourage the development sponsor to sit at the negotiation table.[256] The technicalities included not only the substantive data in the report, but improper notice of any changes in the planning stages of the project subsequent to the Notice. For instance, the consultant might argue that a slight boundary change will adversely affect the biological organisms living within that new boundary line.[257] Ordinarily, the sponsor would have failed to address the boundary change in the Notice as well as the ensuing report. Often, as in this case, the developer cannot afford to contest an environmental impact report in court, which is the con-

250. This section is based on an interview with Donna McCormick, an associate and CEQA consultant with Florian Martinez Associates, a landscape, architecture and land planning firm in Irvine, California.

251. Eagle Valley Draft EIR, SCH No. 89070312 (City of Corona 1991). This Comment uses a mining company as an example of an adverse group which falls under the anti-competitive classification rather than an environmental group or "not-in-my-backyard" group. While anti-competitive groups often create problems, the other two groups provide the most adversity. Interview with Pat Mitchell, *supra* note 40.

252. Interview with Donna McCormick, *supra* note 250.

253. *Id.*

254. *Id.*

255. *Id.* Ms. McCormick has reviewed numerous Draft EIRs. She initially compares the index of the EIR with the Notice of Preparation. She usually will find an omission. If not, she thoroughly reviews the document for lack of EIR data. *Id.*

256. *Id.*

257. *Id.*

sultant's ultimate threat.[258] Furthermore, the costs of producing environmental impact reports can be astronomical.[259] For economic reasons, the developer might decide to respect the mining company's wishes or abandon the project altogether for lack of adequate capital. Even if the project sponsor attempts to appease the mining company, the mining company might still not approve of the project and file suit against the adequacy of the environmental impact report.[260] A win delays the project even longer and possibly forestalls it indefinitely.[261] Alternatively, even if the adversarial mining company loses at trial, the process can still terminate the project due to the delays and costs generated by the litigation.

The scrutinous eye can learn numerous lessons from the above case study. First, by providing adequate definitions, CEQA could help the project sponsor avoid the initial environmental impact report. The Community Development Department, in the above example, based its determination on a public controversy. Had the statute given a more specific definition of what constitutes a project or narrowed the significance determination to relevant environmental issues, the project may have passed and progressed on schedule.[262] Second, once the project sponsor issues an environmental impact report, the governmental agency should make an absolute decision to deny or approve the project.[263] The opposing party would then have to fight the adequacy of the agency's determination rather than stifle the project on technical grounds. If CEQA defined the decision process more precisely, with increased authority and a high standard of review, the opposing party would have less of a bargaining position. Third, this case exemplifies a party's use of CEQA for anti-competitive reasons rather than environmental concerns.[264] To remedy this,

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258. In the illustration, the developer had many investors back out of the project due to time delays. *Id.* Furthermore, the developer had trouble adequately predicting the actual costs of preparing the EIR since continual pressure from the adversarial group increased the costs periodically. *Id.*

259. Ms. McCormick noted that the usual cost of an EIR in California can run up to 4% of the project's total cost. In contrast, the cost in other states ranges from one tenth of one percent to 2% of the total project cost. *Id.*

260. With this knowledge, an adversarial group realizes that the judicial process causes delay and increased costs which could compel a developer to abandon the project at that particular site. *See* Weiss, *supra* note 2 at B1.

261. Usually, the developer, rather than the approving agency, must defend against an action opposing her particular project. CAL. GOVT. CODE § 66474.9 (West 1986). *See* Topanga Ass'n For A Scenic Community v. County of Los Angeles, 263 Cal. Rptr. 214, 223 (Cal. Ct. App. 1989).

262. *See infra* notes 284-339 and accompanying text.

263. *See infra* notes 333-39 and accompanying text.

264. Anti-competitive reasons pertain to private businesses laboring over the use of the land. In this case, the mining company is at odds with the private development of housing. California has yet to decide a case that addresses the issue of anti-competition in CEQA. However, NEPA cases confronting the issue have established a two-prong standard that a plaintiff must pass in order to have standing. Churchill Truck Lines,

the statute should address the problem directly by imposing sanctions, attorney's fees, and costs on an unsuccessful plaintiff.[265]

## VI. THE CURRENT STATE OF CEQA

### *A. Current Problems with CEQA*

In many cases, adequate drafting of an environmental impact report will avoid delays, costs and other CEQA problems.[266] The report drafter understands that she must, at a minimum, include a project's potential effects on the environment, mitigation measures concerning those effects, and possible alternatives.[267] On the other hand, properly drafted reports still face needless scrutiny.[268] Opponents of a proposed project can prevent its fruition in numerous ways. For instance, the greater the CEQA caseload, the less the bureaucracy can handle them.[269] Due to a meritless environmental controversy, the project developer must delay the project until final agency approval.[270] This could lead many investors to avoid development projects entirely, given their potential for serious delay. Nevertheless, the developer eventually will pass on the added costs of development, caused by the needless defenses, to the consumer in the form of higher housing and development costs.[271] The United States Department of Housing and Urban Development "contends that 'unnecessary regulations at all levels of government stifle the ability of the private housing industry to meet the increasing demand for affordable housing throughout the country.' "[272] Further delay occurs when federal, state, and local governmental agencies all must review

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Inc. v. U.S., 533 F.2d 411, 416 (8th Cir. 1976). A plaintiff must first allege that opposed action caused him injury. Secondly, the affected interest must fall within the zone of interest protected or regulated by the statute. *Id.* CEQA looks to NEPA as pursuasive authority in CEQA cases. Friends of Mammoth v. Board of Supervisors of Mono County, 502 P.2d 1049, 1062-63 (Cal. 1972).

265. *See infra* notes 336-39 and accompanying text.

266. Interview with M. Andriette Adams, partner with Culbertson & Adams, a planning law firm in Aliso Viejo, California.

267. *Id.* Some authorities, including Ms. Adams, strongly believe that inadequate drafting causes most of the problems with CEQA.

268. *See infra* notes 283-300 and accompanying text.

269. In the City of Los Angeles, the average report takes 12 to 18 months to process. Daniel P. Garcia, *Environmental Impact Reports and Growth Control*, L.A. LAW., Jan. 1991, at 19. The present backlog in Los Angeles' Department of Planning approaches 100 reports. Under the present processing format, it could take more than 10 years to clear the backlog. *Id.* That estimate does not include an increasing caseload.

270. Shiver, *supra* note 247 at B2.

271. *Id.*

272. *Id.*

a project.[273] The process becomes a "political and convoluted affair."[274] In fact, one commentator noted that "CEQA continues to be the single most important tool of sophisticated slow-growth forces."[275]

As stated in the previous empirical study, "not-in-my-backyard" advocates, as well as extremist environmental groups, make up the majority of development objectors.[276] Due to the complexity of CEQA, objectors can easily challenge a project by finding a procedural mishap in the CEQA process.[277] Once a CEQA case enters the judiciary, the courts inevitably expand the number and type of projects subject to review.[278] Thus, the CEQA process can stifle profoundly needed private development in exchange for deteriorating cities.[279] With increasingly scarce government revenues, private development could provide a substantial portion of a city's redevelopment plans. With governments needing to impose cutbacks to cure deficit ills, private development can create jobs for projects that the government once funded. The legislature can complement private industry by adopting a more narrow environmental policy.

An example of CEQA's complicated procedural guidelines preventing approval of an otherwise beneficial project arose when the California State University chose Taylor Ranch in Ventura County as a potential campus site.[280] Patagonia Corporation fought the proposed site, fearing that the campus would increase traffic and air pollu-

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273. A draft environmental impact report can list numerous agencies that must oversee the project. For instance, on one mining project, federal agencies included the Bureau of Land Management, United States Forest Services, Department of Justice, Bureau of Alcohol, Tobacco and Firearms, Department of Labor, Mine, Safety and Health Administration, United States Fish and Wildlife Service, and the United States Army Corps of Engineers. State agencies included the State Attorney General, California Department of Fish and Game, Regional Water Quality Control Board and the State Land Commission; local agencies included the Fire Warden, Flood Control and the Office of Surveyor/Drainage. Pat Mitchell, Address at the Mining Taxation and Financial Reporting Conference, Las Vegas Nevada (Sept. 18, 1990). *See also* Shiver, *supra* note 246, at B2 (more than 30 agencies divided between local, state and federal agencies may have to review an impact statement which could delay a project up to two years).

274. Garcia, *supra* note 269, at 19.

275. *Id.*

276. *See* Weiss, *supra* note 2; Garcia, *supra* note 269, at 19.

277. *See* Weiss, *supra* note 2.

278. *Id.*

279. *See* Mark Ryavec, *A Pact to End Development Gridlock*, L.A. TIMES, April 30, 1989, § 5, at 5. Ryavec states that

> [f]ar too often the question is not how to build in harmony with the community but whether any building will be allowed at all . . . [which] denies us the tools to cope with the city's many ills: traffic congestion, scarce affordable housing, visual blight and lack of open space. We are also impeded from rejuvenating the basic physical elements that comprise a city—its living quarters, commercial areas, its streets and sewers.

*Id.*

280. Weiss, *supra* note 2.

tion.[281] By continually fighting the environmental impact report on procedural grounds, Patagonia successfully delayed the project for two years; costs to the University soared over one million dollars and, ultimately, state officials chose a new site in Ventura County.[282] Ironically, the Taylor Ranch community now feels that a university on its hillsides would enhance the beauty of its community better than the inevitable development of condominiums that will soon benefit from the spectacular ocean view.[283]

### *B. Recent Courts Confront the Problems by Raising the Judicial Standard of Review*

The legislature designed CEQA to inform the public that its chosen officials properly consider the environmental effects before approving a project, as well as help the public express its *environmental* concerns.[284] While the statute must adequately provide for these policies, it must also prevent broad interpretations of CEQA which further non-environmental concerns.[285] The California judiciary has yet to coin a universal standard for dealing with frivolous claims or for imposing sanctions.[286]

As early as 1986, courts began to notice frivolous lawsuits initiated to stop a project which the litigant could not prevent through the agency decision. One court of appeal addressed this issue in *Long Beach Savings & Loan Association v. Redevelopment Agency*.[287] In that case, the court acknowledged the Savings & Loan's provocation of burdensome administrative hearings and paperwork as attempts to prevent a building demolition.[288] The court rejected such attempts based on an improper use of the statutory guidelines.[289]

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281. *Id.*
282. *Id.*
283. *Id.*
284. CAL. PUB. RES. § 21000.
285. *See* Selmi, *supra* note 27, at 199 (CEQA strongly attacked for the major abuses to its procedures).
286. *But see infra* note 301 and accompanying text.
287. 232 Cal. Rptr. 772 (Cal. Ct. App. 1986).
288. *Id.* at 780. The court stated, "To allow the public review period to proceed ad nauseam would only serve to arm persons dead set against a project with a paralyzing weapon: hired experts who can always discover flaws in mitigation measures. As previously noted, the purpose of CEQA is to inform government decision makers and their constituency of the consequences of a given project, not to derail it in a sea of administrative hearings and paperwork." *Id.* See how this fits in the case study *supra* notes 242-65 and accompanying text (the empirical study).
289. *Long Beach Savings*, 232 Cal. Rptr. at 780.

More recently, the *No Oil* fair argument test has received criticism with respect to its abuse by project opponents and its inconsistent application.[290] The California Supreme Court's closing dictum in the *Citizens of Goleta Valley v. Board of Supervisors*[291] opinion was a clear warning. The court stated that "rules regulating the protection of the environment must not be subverted into an instrument for the oppression and delay of social, economic, or recreational development and advancement."[292]

Subsequent lower court decisions have heeded the supreme court's dicta. As review, the *No Oil* significant impact analysis requires an environmental impact report whenever a project opponent can offer a fair argument based on substantial evidence that the proposed project will have a significant effect on the environment.[293] The lower courts have increasingly tightened this standard in an attempt to eliminate anti-development groups that invoke the CEQA process for purposes having no environmental consequence.[294] For instance, in *Benton v. Board of Supervisors*,[295] the California Court of Appeal seemed to acknowledge that Benton opposed a winery project, not on environmental grounds, but because the Board approved relocating the winery to Benton's neighborhood.[296] Benton cited project noise as the potential impact requiring an environmental impact report. The court rejected Benton's argument by raising the standard of re-

290. *See* Friends of "B" Street v. City of Hayward, 165 Cal. Rptr. 514, 528 (Cal. Ct. App. 1980) (easing a challenge to an agency's fair argument determination by only requiring substantial evidence to the contrary of the agency decision rather than allowing deference to fair argument of the agency's determination); Board of Supervisors of Sacramento County v. Sacramento Local Agency Form. Comm'n, 286 Cal. Rptr. 171, 193, (Cal. Ct. App. 1991) (no deference to an agency's factual determination); Sundstrom v. County of Mendocino, 248 Cal. Rptr. 352, 357 (Cal. Ct. App. 1988) (EIR may be required in the absence of substantial evidence one way or another); Citizens Ass'n for Sensible Dev. of Bishop Area v. County of Inyo, 217 Cal. Rptr. 893, 914-15 (Cal. Ct. App. 1985) ("court may not substitute its own judgment for that of the local agency"); Newberry Springs Water Ass'n v. County of San Bernardino, 198 Cal. Rptr. 100, 118-19 (Cal. Ct. App. 1984) (court reluctantly bows to agency factual findings).

291. 801 P.2d 1161 (Cal. 1990).

292. *Id.* at 1175.

293. No Oil, Inc. v. City of Los Angeles, 529 P.2d 66, 83 (Cal. 1974).

294. *See* Tina A. Thomas, *CEQA Challenges Face A New Level of Scrutiny*, CONTINUING EDUCATION OF THE BAR, LAND USE FORUM, at 54 (Spring 1992). Benton v. Board of Supervisors, 277 Cal. Rptr. 481, 490-91 (Cal. Ct. App. 1991); Uhler v. City of Encinitas 278 Cal. Rptr. 157, 162 (Cal. Ct. App. 1991) (noting that the dissenters failed to base their objection on environmental grounds); Leonoff v. Board of Supervisors, 272 Cal. Rptr. 372, 380 (Cal. Ct. App. 1990) (upholding an agency's consideration of "the big picture"). Although the court has calmly addressed these cases, further abuse of the system could cause the court to be less tolerant. *See* Thomas, *supra*, at 55.

295. 277 Cal. Rptr. 481 (Cal. Ct. App. 1991).

296. *Id.* at 490-91. The project was originally given a negative declaration one mile from the relocation site. *Id.* at 484-85. Benton argued that the relocation needed an environmental impact report because of the changed conditions of the project. *Id.* The court held that a second negative declaration sufficed. *Id.*

view to a "substantial evidence" test.[297]

Along with the "not-in-my-backyard" cases, the California Court of Appeal has rejected challenges to projects that object solely on cultural and social grounds.[298] Furthermore, since CEQA expressly excludes cases concerning economic impact,[299] some opponents attempt to mask their opposition to a project's adverse economic effects under supposed environmental concerns.[300] In these cases, the court might impose sanctions on the plaintiff for bringing a frivolous lawsuit.[301]

## VII. RECOMMENDATIONS

The California legislature frequently amends CEQA as new judicial interpretations arise and also in response to developers' costs and delays.[302] Furthermore, the Office of Planning and Research meets every two years to update the CEQA Guidelines.[303] Conceivably, this

297. The court opined that the substantial evidence test applies in situations where the issue concerns a second negative declaration. The test requires an EIR

> only if (1) subsequent changes were proposed which required important revisions of the previous negative declaration because of new significant environmental impacts not considered in the initial negative declaration, (2) substantial changes will occur with respect to the circumstances under which the project is to be undertaken requiring important revisions of the initial negative declaration because of new significant environmental impacts not covered in the previous negative declaration, or (3) new information of substantial importance to the project became available."

*Id.* at 490-91 (citing CAL. CODE REGS. tit. 14, § 15162(a)). Even though the court narrowly applied the substantial evidence test, it openly rejected the plaintiffs' frivolous claim. *Id. See* Thomas, *supra* note 294, at 55 (even though the court did not openly criticize the plaintiffs, they might have rejected the "not-in-my-backyard" mentality).

298. *See* Thomas, *supra* note 294, at 55 (citing Citizens Action to Serve All Students v. Thornley, 272 Cal. Rptr. 83 (Cal. Ct. App. 1990)).

299. *See* CAL. PUB. RES. CODE § 21068; CAL. CODE REGS. tit. 14, § 15382; *see also* Citizens for Quality Growth v. City of Mount Shasta, 243 Cal. Rptr. 727, 734 (Cal. Ct. App. 1988).

300. *See* Centinela Hosp. v. City of Inglewood, 275 Cal. Rptr. 901 (Cal. Ct. App. 1990) (evidence tended to show that that lawsuit was filed for economic effects on a nearby corporation). *But see* Citizens Ass'n for Sensible Dev. of Bishop Area v. County of Inyo, 217 Cal. Rptr. 893, 904 (Cal. Ct. App. 1985) (physical impacts resulting from economic effects fall under CEQA).

301. Although the courts have yet to impose sanctions for frivolous lawsuits in CEQA cases, the Second District Court of Appeal suggested that it would consider sanctioning a frivolous claim. *See* Mann v. Community Redevelopment Agency, 285 Cal. Rptr. 9, 14 (Cal. Ct. App. 1991). However, the court did not consider sanctions in *Centinela*. *See supra* note 300. Strikingly, the court considered attorney's fees for the *plaintiff* in *Citizens Ass'n for Sensible Dev. of Bishop Area*, 217 Cal. Rptr. at 909.

302. CONTINUING EDUCATION, *supra* note 28, at 5 (1991).

303. *Id.* at 6. This meeting is codified under California Public Resources Code, Section 21087. The California Supreme Court has yet to determine the actual authority of the Guidelines, although it has opined that courts should give the Guidelines "great

system will eventually help the legislature to perfect the CEQA process. In the meantime, inadequate report drafting, or abuse of the CEQA process, or both, will cause the consumer to pay for the bureaucratic inefficiency through increased costs and investment difficulties. Waiting for the judiciary to implement changes not only takes an inordinate amount of time, but it leaves behind those project sponsors who cannot afford to litigate. The legislature must clarify CEQA to remedy the present inefficiency and provide consistency for the small businesses.

Supporters of the present CEQA process claim that it successfully prevented an eruption of mini-malls, extraordinary traffic congestion and overall careless development.[304] Even those affected by CEQA's procedures applaud its overall intentions.[305] One advocate stated, "I may not like some of the results and the time it takes, but on balance it is better to have than have not . . . . I sometimes don't like the 55-m.p.h. speed limit either . . . [b]ut I'd rather have it."[306] Thus, most people agree that an agency must publicize the effects of a project's environmental impacts to some degree.

Yet, experience proves that CEQA does not *effectively* achieve its goal. At present, the costs and delays created by the preparation of an environmental impact report hinder the small business owner's ability to receive the private investment required for a development project.[307] Eventually, only large-scale, wealthy development companies will have the adequate capital and time to await approval of a proposed project. Thus, opportunities for the entrepreneur are quickly diminishing or becoming contingent on the will of a project opposer. In a time of recession, and possibly depression, this could exacerbate the economic hardships facing the country.[308] One must remember that development includes not only new housing and com-

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weight . . . except when a provision is clearly unauthorized or erroneous." *Id.* at 7-8 (quoting Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal., 764 P.2d 278, 282 n.2 (Cal. 1988)).

304. Weiss, *supra* note 2. The article cites the San Fernando Valley as an example of degenerate growth before the institution of CEQA: " 'Look at the San Fernando Valley, that was built before CEQA . . . . They have landfills erupting like boils, their transportation corridors are comatose and they have no concept of open space.' " *Id.* (quoting Neil Moyer, president of the Environmental Coalition of Ventura County).

305. *Id.*

306. *Id.* (citing Fred Maas, vice president of Potomac Investment Associates).

307. *See* Ryavec, *supra* note 279.

308. *See* Thomas McCarroll, *Starting Over*, TIME, Jan. 6, 1992, at 62. The author noted that entrepreneurs find it increasingly difficult to raise venture capital:

> The challenge has become especially acute because the flow of venture capital, so abundant in the 1980s, has dried up as investors have become more cautious. The amount of venture capital during 1990 fell 53% from the previous year, to $202 million. When the numbers for 1991 are in they are expected to show an even steeper decline.

*Id.*

mercial areas, but also redevelopment, such as street paving and renovating deteriorated cities. With CEQA risks, private developers have less incentive to support redevelopment projects. Many of the costs that adversarial groups generate shift to the taxpayer as the government must fund the redevelopment of outdated structures and worn-down streets.[309] CEQA should promote competition for these projects.

CEQA needs to address the current problems by instituting a "new social contract" between the governmental agencies, developers, and adversarial groups.[310] In other words, CEQA should incorporate the basic constitutional guarantee that no citizen shall be deprived of the right to life, liberty and *property* without due process of law.[311] Therefore, the legislature should adopt a measure which would establish the developer's property right to build a feasible project before the CEQA process commences.[312] Thus, the developer can assure investors that the project will be completed in one form or another.[313] Alternatively, if the project is unfeasible, the developer will

309. The need for earthquake-safe buildings is a prime example. Likewise, the redevelopment of Los Angeles after the 1992 riots will clearly face various CEQA difficulties.

310. Ryavec, *supra* note 279. Ryavec intelligently defines the scope of a "new social contract":

> Under this proposed truce, property owners and developers would agree to fully mitigate all adverse impacts on a community from a new project. The environmental review mandated by [CEQA] would be the process used to *objectively* determine impacts and subsequent mitigation measures. If particular deleterious impacts cannot be alleviated, then the project would be limited or another use could be made of the site. A commitment to abide by such a process would by a substantial concession from developers.
>
> For their part, city elected officials, planners and neighborhood activists would accede to the following: They would accept that owners have the right to develop their property (except in cases where proposed uses pose significant danger to life and limb); they would agree that a recent U.S. Supreme Court decision prevents cities from requiring developers to ameliorate pre-existing conditions (despite the decision, cities often go beyond it unless litigation is threatened); and finally, the city would establish a process to alert neighbors early and to choose representatives who understand the planning process and would speak with authority for their neighborhood. Too often developers negotiate in good faith with ad hoc community representatives only to be blind-sided by a second or third "neighborhood group" late in the process.

*Id.* (emphasis added).

311. U.S. CONST. amend. XIV.

312. *See* Ryavec, *supra* note 279. CEQA should acknowledge that "since the permit process is so long and the expenses incurred in site acquisition, environmental reports and architectural drawings are so great, some means of locking-in the right to build prior to receipt of the actual building permit should be considered." *Id.*

313. If the builder proposes a project that is clearly environmentally adverse, he

avoid wasteful expenses.

Incorporating the lessons of sister states' environmental policies into CEQA would also provide for a more workable statute. Notably, every state must address subjective concerns. Additionally, however, the California legislature should make the CEQA process more objective, and thus promote a consistent method of determining the consequences of a development. This would assist project sponsors in the initial development stages and eliminate groundless adversarial attacks.[314] For example, New York incorporates the successes of CEQA in SEQRA, but it also expands on CEQA concepts.

SEQRA's expansive definition of "project" gives a developer preliminary notice of what a government agency will or will not scrutinize.[315] CEQA and its Guidelines avoid an all-encompassing definition.[316] Rather, CEQA provides a general definition, while the Guidelines periodically add particular case adjudications to narrow the definition.[317] By providing a definition that sufficiently outlines boundaries where an agency absolutely will or will not require an environmental impact report, CEQA would create a reference for developers to decide what type of project to pursue.[318] For instance, the statute could establish a minimum and maximum number of units or acreage per development project that CEQA addresses in one capacity or another.[319] The definition could also address the size of the city or town involved, the number of parking spaces allotted, as well as a number of aesthetic factors.[320] The legislature could adopt any number of creative options to help a developer avoid needless disputes over whether a certain project requires an environmental impact report.[321] Ultimately, the developer should be able to rely on the statute to determine what type of project CEQA does and does not cover.

Unlike a definition of "project," providing an inflexible definition of "significant effect" on the environment admittedly does more

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probably should bear the initial costs for negligently instituting the process. A more workable statute would solidify this proposition.

314. This article cannot address every existing environmental policy without a lengthy discussion. It will discuss some examples, but the legislature has the resources, such as the Office of Planning and Research, to scour other states' environmental policies and their successes and failures. The study could present some astounding results.

315. *See supra* note 155-72 and accompanying text (defining SEQRA project).

316. CAL. PUB. RES. CODE § 21065; CAL. CODE REGS. tit. 14, § 15378.

317. CAL. PUB. RES. CODE § 21065; CAL. CODE REGS. tit. 14, § 15378(a)(4), (5).

318. *See supra* note 155-72 and accompanying text (defining SEQRA project).

319. *Id.*

320. *Id.*

321. *See generally*, CAL. CODE REGS. tit. 21 (setting forth the implementation of CEQA in the Department of Transportation).

harm than good.[322] An agency determines the environmental significance of a project according to various factors. A project which has a significant effect in one area may not have such an effect in another area.[323] Nevertheless, some suggestions could help make CEQA's determination easier on the project sponsors and give the courts more guidance. With statutory help, the developers might experience less litigation and more summary judgments.

Washington's SEPA exemplifies two possible methods of strengthening a significance determination. First, SEPA adopts the federal definition of a significant impact.[324] Under this definition, a significant impact occurs "whenever more than a moderate effect . . . is a reasonable probability."[325] In contrast, CEQA defines "significant effect" as "whenever it can be fairly argued on the basis of substantial evidence that the project *may* have significant environmental impact."[326] Allowing environmental impact reports on projects which "*may*" have a significant effect creates subjective speculation in the minds of adversarial groups. Furthermore, the courts' inconsistent interpretation fosters speculative litigation results. By narrowing the definition to those projects which have more than a moderate probability of substantially affecting the environment, the statute would make the significance determination more objective. This may eliminate at least some of the adversarial groups' hollow claims.

Second, Washington takes pride in SEPA's substantive policies.[327] Under SEPA, governmental agencies act as a Public Trust in protecting the state's natural resources.[328] Thus, Washington agencies have clear authority to approve or disapprove a project based upon the project's environmental impact report.[329] Approval of the project mandates that the project sponsor conform to the substantive requirements of SEPA, while disapproval indicates that the project sponsor failed to meet such requirements.[330]

322. *See* Norway Hill Preservation and Protection Ass'n v. King County Council, 552 P.2d 674, 680 (Wash. 1976).

323. For example, an agency may make a significance determination related to traffic problems. Thus, a densely populated area will more likely allow for a small project than would a less populated area.

324. *See supra* notes 211-15 and accompanying text.

325. *Norway Hill*, 552 P.2d at 680.

326. No Oil, Inc. v. City of Los Angeles, 529 P.2d 66, 70 (Cal. 1974) (emphasis added).

327. *See supra* notes 218-41 and accompanying text.

328. *See* Rodgers, *supra* note 201, at 64.

329. *See supra* notes 218-41 and accompanying text.

330. *See* Rodgers, *supra* note 201, at 59.

CEQA gives agencies a seldom-used authority to disapprove a project on environmental grounds alone.[331] However, CEQA authorities believe that the statute, in practicality, serves as a mere informational document supporting self-government.[332] Coupled with a broadly interpreted judicial standard of review,[333] CEQA becomes incredibly useful to environmental extremists and "not-in-my-backyard" advocates.

The judiciary, following the increased erosion of the public controversy and occasionally heightened fair argument standard of review, seem increasingly willing to eliminate baseless claims. The legislature could codify a judicial standard of review that promotes substantive agency decisions. For instance, a uniform, high-threshold judicial standard of review would substantially diminish a project opposer's bargaining power outside of the CEQA process.[334] Such a provision would emphasize a governmental agency's ultimate substantive authority.[335]

Another approach involves the use of a hearing officer. After an agency determines that a project necessitates an environmental impact report, the project sponsor would commission a report from either the appropriate government agency or a private consulting firm. After final preparation, the sponsor would submit the environmental impact report to a hearing officer.[336] The hearing officer would conduct a public hearing on the project. After examining legitimate public concerns, the hearing officer would offer findings and recommendations to the lead agency for its decision. The agency would have the authority to incorporate the hearing officer's suggestions. The agency's final decision would bind the project sponsor and its adversaries. The added procedural hearing would effectively eliminate bias in an agency's approval or disapproval of the project. Ultimately, the parties would have the burden of satisfying a high judicial standard of review if they intended to pursue litigation.[337]

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331. *See* CAL. PUB. RES. CODE §§ 21002, 21002.1; *see also* CAL. CODE REGS. tit. 14, §§ 15002(h)(5), 15042.

332. *See* Sierra Club v. Gilroy City Council, 271 Cal. Rptr. 393, 398 (Cal. Ct. App. 1990) (CEQA provisions are mere policy statements that give agencies no more power than that of mitigation and overriding considerations). *See also* Laurel Heights Improvement Ass'n of San Francisco v. Regents of the Univ. of Cal., 764 P.2d 278, 293-94 (Cal. 1988) (allowing public criticism fosters self government).

333. *See supra* note 290 and accompanying text.

334. Interview with Pat Mitchell, *supra* note 40.

335. *Id.*

336. *See, e.g.*, WASH. REV. CODE ANN. § 43.21B.

337. Much of the discussion regarding the hearing officer was promulgated from the interview with Ms. Adams. *See supra* note 266. For the present state of review, see CAL. PUB. RES. CODE §§ 21168, 21168.5. *See* East Peninsula Educ. Council, Inc. v. Palos Verdes Peninsula Unified Sch. Dist., 258 Cal. Rptr. 147, 152-53 (Cal. Ct. App. 1989). The *East Peninsula* court stated, "An agency's use of an erroneous legal standard constitutes a failure to proceed in a manner required by law. The interpretation

Furthermore, questionable claims should result in court-imposed sanctions, or at least fees and costs, on the litigious party.[338]

Finally, the legislature needs to respond to the judiciary's disfavor of illegitimate claims.[339] If the legislature amended CEQA to impose attorney's fees, costs, sanctions, and even lost opportunity costs (including the loss of investments) on frivolous claims brought by an adversarial group, the opponent would be discouraged from delaying or starving a project. One authority suggests that the statute base compensation for frivolous claims on a percentage of the actual value of the project rather than on reasonable attorney's fees.[340] Once the courts set a precedent against frivolous claims, project sponsors will possess reliable authority to avoid the adversarial group's baseless claims.

## VIII. CONCLUSION

Environmental policies on both the federal and state level produce welcomed restraints on development projects. With California's obvious increase in population, the potential for environmental dangers has increased substantially. CEQA mandates environmentally informed decision-making on every project a developer wishes to undertake. The legislature needs to procure CEQA's purpose by eliminating abusive claims initiated solely to prevent an otherwise environmentally conscious project. Currently, the project opponent is victorious regardless of the outcome of a CEQA case because of the delays and costs carried by the sponsor. This often causes a small business to abort its plans. This becomes even more apparent in economically difficult times where a business' livelihood centers on proper interpretation of legislative mandates. Ultimately, the loss of small businesses strengthens large corporations, which monopolize an industry and pass any increased costs on to the consumer. The

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and applicability of a statute is a question of law requiring an independent determination by the reviewing court." *Id. See also* Kings County Farm Bureau v. City of Hanford, 270 Cal. Rptr. 650, 659-62 (Cal. Ct. App. 1990). Notwithstanding prejudicial error, the courts will generally give great deference to an agency decision. El Dorado Union High Sch. Dist. v. City of Placerville, 192 Cal. Rptr. 480, 483 (Cal. Ct. App. 1983).

338. *See* CAL. CODE OF CIV. PROC. § 1021.5 (West 1983); *see also* San Bernardino Valley Audubon Soc'y, Inc. v. County of San Bernardino, 202 Cal. Rptr. 423, 430-33 (Cal. Ct. App. 1984); Schwartz v. City of Rosemead, 202 Cal. Rptr. 400, 405-10 (Cal. Ct. App. 1984). Unfortunately, these cases fail to suggest any sanctions other than attorney's fees.

339. *See supra* notes 284-301 and accompanying text.

340. Interview with Pat Mitchell, *supra* note 40.

inefficiency of CEQA, coupled with the loss of competitive development, could result in sky-rocketing housing costs, depressed raw land values, and continued deterioration of existing city structures.

Ideally, a potential developer, or redeveloper, should be able to refer to CEQA as a consistent guide to environmentally conscious development. Initially, the developer should be able to refer to CEQA to establish what type of project he intends to pursue. If CEQA covers his project, he then looks for an exemption. Without an exemption, he must refer to the significance determination. If his project will significantly impact the environment, he can then invent creative mitigation measures. If mitigation measures will not alleviate the impact, he can decide on a new project. Ultimately, the developer must submit his project to the agency. The agency may prepare an environmental impact report, and make a final determination as to the project's viability. Logically, the developer preordains whether the agency will approve his project by properly researching and mitigating adverse environmental impacts.

The concept is simple, but the bureaucracy is difficult. Inevitably, the modernization of society, the advances in technology, and the increases in population necessitate the building and rebuilding of cities, streets, sewers, and the like. Unquestionably, all parties involved—government officials, developers, and environmentally conscious groups—envision the same goal. They all hope to find some common ground between economic development and preservation of the environment. However, to achieve this goal, all parties involved must work together. Thus, the legislature must restructure CEQA in order to militate a universally beneficial CEQA process.

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