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The Future of EIRs in Land Use Regulation

JOHN M. WINTERS*

I. INTRODUCTION

The California Environmental Quality Act¹ (hereinafter CEQA) requires that all public entities in California determine in advance the environmental effects of their regulatory and public work activities before decisions are made which might significantly affect the environment and that they demonstrate why they decided to undertake or regulate such activities as they did. The primary purpose of this article is to make some tentative observations about how CEQA, its guidelines² and the cases arising under CEQA should legally affect the regulation of private land development by local governments in California.

Incidental to that discussion will be a consideration of cases arising under the National Environmental Policy Act³ (hereinafter NEPA), which has produced many more judicial opinions. Since CEQA is modeled after NEPA, the California courts usually mention that cases decided under NEPA are relevant to the inter-

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1. CAL. PUB. RES. CODE §§ 21000-21174 (West Supp. 1976).

2. 14 CAL. ADMIN. CODE §§ 15000-15180 (West 1975).

3. 42 U.S.C. §§ 4321-4347 (1973).

pretation of CEQA, although one appellate court has suggested that CEQA is designed to provide greater protection to the physical environment than NEPA and is to be interpreted accordingly.⁴

What is now needed is more empirical information on the practical effectiveness of CEQA in achieving its policies so that, where appropriate, the Legislature may modify the statute itself and so that the courts may understand the real world of land use decision-making in order to make their decisions effective in accomplishing the same goals. Knowledge of the actual practices under CEQA and, to some extent, the costs of using Environmental Impact Reports (hereafter EIRs) is being developed. Several current studies will be used in conjunction with particular court cases and particular parts of CEQA.⁵

In general terms, it is now known that approximately 4,000 EIRs were prepared in 1974, of which 3,400 were prepared by cities and counties.⁶ Of these, some 2,500 were for private projects requiring a discretionary decision from government in order to carry out the project. It has also been determined that in these private project EIRs, 65% mention the impact of traffic congestion, 44% air pollution, 41% aesthetic degradation (scenic views, vistas, etc.), 32% degradation of native habitat, 32% runoff, 30% water pollution, 25% noise from the project; from 18% down to 6%

4. *San Francisco Ecology Center v. City & County of San Francisco*, 8 Cal. App. 3d 584, 590, 122 Cal. Rptr. 100, 104 (1975).

5. One study to be thus used is the report prepared for the Assembly Committee on Local Government, John T. Knox, Chairman, by an Environmental firm of San Diego, California: ENVIRONMENTAL ANALYSIS SYSTEMS, INC., THE CALIFORNIA ENVIRONMENTAL QUALITY ACT: AN EVALUATION EMPHASIZING ITS IMPACT UPON CALIFORNIA CITIES AND COUNTIES WITH RECOMMENDATIONS FOR IMPROVING ITS EFFECTIVENESS (Vol. I 1975) [hereinafter cited as ASS'Y LOCAL GOV'T COMM. REPORT]. Data used for this study included that in the CALIFORNIA ENVIRONMENTAL MONITOR, published by the State Clearing House, an in-depth review of 185 EIRs prepared by 23 cities and counties and interviews of elected officials, agency staff and private applicants in over 50 agencies.

Another study is the report prepared for the State Office of Planning and Research by the University of California: PUBLIC POLICY RESEARCH ORGANIZATION OF THE UNIVERSITY OF CALIFORNIA (IRVINE), THE CALIFORNIA ENVIRONMENTAL QUALITY ACT: LOCAL GOVERNMENT RESPONSE 1975 [hereinafter cited as PPRO]. The study examined the practices in fifteen California cities and counties, using the areas selected by the Office of Planning and Research as having "innovative implementation strategies."

6. ASS'Y LOCAL GOV'T COMM. REPORT, *supra* note 5 at 25-25b.

review growth inducement, open space, noise impact on users, change in neighborhood or area character, loss of agricultural lands, school inadequacy, construction noise, traffic and pedestrian safety, seismic hazard, ground water supply, archaeological site, adequacy of public services (not specific), displacement of housing, housing provisions, construction dust, public revenue and expense, and construction nuisance (not specific) with lesser percents for other impacts.⁷

Further, in 31% of the projects, mitigation measures attributable to environmental review were found in one study.⁸ From the same source, one learns that conditions are imposed in 30% of the projects in order to mitigate adverse impact and 4% of the projects were denied specifically for environmental reasons,⁹ with some 60% of all identified impacts being mitigated.¹⁰ How much of this is due primarily to CEQA is questionable for it seems that compliance has varied from substantial reform through *pro forma* compliance,¹¹ and in some areas the requirement has had no effect at all.¹²

It is equally necessary to evaluate CEQA, its guidelines and its judicial gloss in terms of whether environmental policies and goals should be accomplished through this type of government intervention at all and whether they could be accomplished with less cost to the public and private sectors. The costs of delay as well as the costs of artificially induced scarcities may or may not be as extensive as feared. One estimate of the average delay for an EIR is three months.¹³ For example, if it does cost one hundred and fifty dollars per dwelling unit as one study has very cautiously suggested¹⁴ and two to three dollars per capita,¹⁵ this cost has to be evaluated in terms of what is gained through the CEQA process and ways to save costs without undermining the policies of CEQA, assuming they are worthwhile, must be sought.

II. THE LEGISLATIVE POLICY OF CEQA AND NEPA

The statements of policy in both CEQA¹⁶ and NEPA¹⁷, if taken

7. *Id.* at 26a.

8. *Id.* at 27.

9. *Id.* at 27-28.

10. *Id.* at 28.

11. PPRO, *supra* note 5 at II-2.

12. *Id.* at II-6.

13. ASS'Y LOCAL GOV'T COMM. REPORT, *supra* note 5 at 41.

14. *Id.* at 78.

15. *Id.* at 77.

16. CAL. PUB. RES. CODE §§ 2100-01 (West Supp. 1976).

17. 42 U.S.C. §§ 4321, 4331 (1973).

literally, evidence a substantial legislative commitment to both present and future generations to attain a rational balance between man and his environment, between the use and the preservation of that environment, and between health, safety and beauty on the one hand and productivity on the other. This is particularly true of CEQA, which provides, for example, that

it is the intent of the Legislature that all agencies . . . 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 damages*.¹⁸

At least in part because of the strong and sweeping language of these expressions of legislative intent, the state and federal court opinions cited throughout this article have insisted upon implementation of the requirements of the EIR and EIS process. So far, however, the language has been used primarily to insist upon what might be called the procedural or process aspects of the two acts and only limited attention has been given to the effects of the acts upon the actual decision to be reached.

Necessarily, the injection of this new requirement into the decision-making processes of so many diverse agencies not only has posed difficulties in implementing the process but also has created extensive difficulties in ascertaining exactly what the decision maker is supposed to do with the results of the environmental impact report or statement. For agencies with specialized goals and expertise, the immediate response was either to ignore the new requirements or to respond inadequately. For example, an agency responsible for highways had the existing responsibility of utilizing its expertise to assure the physical quality of the highways in terms of the durability of the material used for the roads, the quality of the rocks upon which the road was being built, and so on. Expertise in the safety element of highway design was also needed, as was a systematic way of dealing with other agencies, including local governments and the general public, through the requirements for corridor and design hearings. Presumably the agency considered the need for the roads and highways by measuring existing uses and projecting population growth based upon existing

18. CAL. PUB. RES. CODE § 21000(g) (West Supp. 1976).

trends and the anticipated land use activities of other government entities. With the injection of CEQA and NEPA into their decision-making process, road building agencies now must accurately demonstrate that they have taken into account any environmental impacts, such as those upon the marine vegetation within bodies of water through which, or around which, highways might go, as well as the wildlife habitats and natural vegetation which would be affected both by the building of the highway and its eventual use; they must also take into account the growth inducing impact of their projects. As will be shown, they may then have to decide whether or not the growth thus induced is in some sense desirable or not. This latter goal might be in direct conflict with the goals such agencies formerly sought to achieve; in the past such agencies deliberately responded by providing access based upon expected or existing growth rather than discouraging it by withholding a proposed highway.

The decisions of local land use regulators necessarily should have accomplished a much broader range of goals. As a matter of fact, their planning processes now have come to recognize environmental goals independently of CEQA. The legislative concept of local government land use regulation seems to be based upon the assumption that initial and overriding policy decisions lie in local general plans. These general plans must include such environmentally-oriented elements as a land use element, a circulation element, a conservation element, an open space element, a seismic safety element, a noise element, a scenic highway element¹⁹ and a safety element for protection of the community from fires and geologic hazards.²⁰ Zoning decisions must in turn be consistent with these general plans²¹ and, of course, all individual decisions, such as issuance of special use permits, approval of subdivision maps and planned unit developments, must be consistent with the zoning. By this process, even without CEQA, theoretically there should be a consistency between the environmental elements within the general plan and all land use decisions. Moreover, there is a requirement that the governing body deny the approval of a subdivision map if it makes any of the following findings:

- [C] that the site is not physically suited for the type of development.
- [D] that the site is not physically suitable for the proposed density of development.

19. CAL. GOV'T CODE § 65302 (West Supp. 1976).

20. CAL. GOV'T CODE § 65302.1 (West Supp. 1976).

21. CAL. GOV'T CODE § 65860 (West Supp. 1976).

- [E] that the design of the subdivision or the proposed improvement is likely to cause substantial environmental damage or substantially and unavoidably injure fish or wildlife or their habitat.
- [F] that the design of the subdivision or the type of the improvement is likely to cause serious health problems.²²

As will be demonstrated throughout this article, CEQA and NEPA contemplate the attainment of these environmental goals through a publicly reviewable, rational decision-making process. Implementation of this process is to be encouraged by a cooperative effort among various governments which are directly or indirectly involved with the particular decisions to be evaluated as well as by citizen input. As the literally hundreds of cases under NEPA and the dozens of appellate cases under CEQA will demonstrate, judicial review of this decision-making process has been a major factor in the development of such effective environmental review process as does exist. Since the legislatures have not provided substantial funding to insure implementation of these statutes, the actions brought in court by environmental groups and the California Attorney General have been primarily responsible for bringing to light failures to comply with the legislation and for forcing compliance in individual instances. One cannot help but speculate, however, about the effectiveness of either the legislation or of the courts in making CEQA an effective tool for accomplishing its policies. The studies²³ of the process which do exist reach somewhat positive conclusions about the effectiveness of the process; at the same time they point to the difficulties in empirically assessing the extent to which CEQA has accomplished changes.

This author questions the extent to which legislation or judicial decisions will change behavior. Does the locally elected cement contractor or lumberman who has campaigned on a political platform of full employment, business expansion and decreased government involvement in the regulation of the private sector, automatically take on a new responsibility when the Legislature passes

22. CAL. GOV'T CODE § 65567 (West Supp. 1976). For a detailed discussion of the relationship between CEQA and this legislation, see Winters, *Environmentally Sensitive Land Use Regulations in California*, 10 SAN DIEGO L. REV. 693 (1973).

23. PPRO and ASS'Y LOCAL GOV'T COMM. REPORT, *supra* note 5.

laws which run contrary to his basic philosophy about local government control of land use? If a governmental staff or a citizens' group raises objections about a particular regulated project because of its potential adverse environmental impact or because of the inadequacy of the assessment to determine such impacts, does this influence the decision maker who realizes that the objectors lack the resources for pursuing their objections through court processes? Does the government attorney who realizes the same probability of lack of challenge by effective legal representation on the other side argue against the basic philosophy of his or her employer in order to insist upon a full and rational implementation of CEQA?

Attempts to assess the rationale behind the land use decision-making process in the past seem to reveal the lack of any understandable and coherent process for achieving even a modest degree of rationality.²⁴ Even if the decisions reached are to some extent or in some sense "good" decisions, the lack of an unidentifiable and reviewable process prevents an appreciation of this. Of course, the lack of a rational process is one of the factors resulting in recommendations that local government get out of much of the land use decision-making process.²⁵ While recognizing some validity to this position, the author of this article assumes that local government attempts to preserve and protect the environment are appropriate and best carried out by assessing the consequences of proposed decisions and systematically choosing among reasonable alternatives.

An added difficulty with the attempts to assess the impact of CEQA upon the decision-making process lies in what presumably is a lawyer's common understanding of how one might approach a situation which is essentially a negotiation setting. Surely, few parties to the CEQA process are desirous of a lawsuit to resolve any differences of opinion, except where delay is a tactic; reaching an out of court settlement is generally accepted as preferable to a lawsuit because of delays and frequent uncertainties as well as the added cost of litigation. If developers approach the land use regulatory process as a negotiation process and if lawyers give advice based upon the way in which lawyers approach other lawyers where there is a conflict to be resolved by negotiation, then one would expect that negotiations will be commenced by the proponent seeking more than is wanted, realizing that the negotiation process will result in a trading off until a common ground is

24. See R. BABCOCK, *THE ZONING GAME* (1966); D. MANDELKER, *THE ZONING DILEMMA* (1971); and PPRO, *supra* note 5.

25. See SIEGAN, *LAND USE WITHOUT ZONING* (1972).

reached. Under this model, the developer would seek more in terms of density or greater degradation of the environment than he would ultimately want for his own self-interest. Then the EIR process can produce mitigation and the imposition of conditions to eliminate adverse environmental effects with the possible result that the project will be carried out exactly as the developer desired. In that process, however, it will appear that concessions have been made and that, indeed, CEQA has had an impact.

A similar tactic would be for the developer or the consulting firm to prepare a draft EIR which is known to be inadequate. Public or staff review then could expose problems not alluded to in the draft EIR and factual data could be gathered. This would make it appear that the EIR review process has uncovered new information and thus is doing its job, even though the proponent of the project was well aware of these consequences and would make no concessions at all. Once the EIR has been improved by the addition of data, it would then appear that everything is proper. Had the original EIR included this data, it might well be that the staff or the public would have insisted upon further findings which would have been more likely to result in disapproval or in modification of the project. There is probably no way to prove whether or not either of these tactics is being used.

III. THE EIR AND EIS—THE ACTION PRODUCING ASPECT OF THE ACT

The method devised under both CEQA and NEPA for achieving their purpose is the environmental impact report (California) or statement (federal), an informational document which must be considered by every public agency before taking action which significantly affects the environment. The EIR or EIS must include a detailed statement of:

1. The environmental impact of the proposed action.
2. Any adverse environmental effects which cannot be avoided should the proposal be implemented.
3. Mitigation measures proposed to minimize the impact, including but not limited to, measures proposed to reduce wasteful, inefficient and unnecessary consumption of energy (not expressly included in NEPA).
4. Alternatives to the proposed action (including abandonment).
5. The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity.

6. Any irreversible changes which would be involved in the proposed action should it be implemented.
7. The growth-inducing impact of the proposed action (not expressly included in NEPA).²⁶

Before it is necessary to prepare such a document, a determination must be made as to whether the project has a "significant effect on the environment"²⁷ (the federal statute is worded "significantly affecting the quality of the human environment").²⁸ Neither the courts nor the guidelines²⁹ are very helpful in interpreting the limited statutory definition of "significant effect" as found in CEQA.³⁰

Some idea of the California Supreme Court's interpretation can be found in such statements as "[t]he very uncertainty created by the conflicting assertions made by the parties as to the environmental effect . . . underscore the necessity of the EIR to substitute some degree of factual certainty for tentative opinion and speculation."³¹

One major purpose of an EIR is to inform other government agencies and the public generally, of the environmental impact of a proposed project . . . , and to demonstrate to an apprehensive citizenry that the agency has in fact analyzed and considered the ecological implication of its action. A simple resolution or negative declaration stating that the project will have no significant environmental effect, cannot serve this function.³²

This determination must be in writing.³³ The technique for determining that no EIR is required to be prepared is the negative declaration.³⁴ This threshold decision has the potential for effectively undermining the CEQA policies since, in the absence of effective public involvement or appeal processes, environmental consequences may be "swept under the rug." Thus, the recommendation has been made to make these decisions more open and available to the decision makers.³⁵

26. 42 U.S.C. § 4332(c) (1973); CAL. PUB. RES. CODE § 21100 (West Supp. 1976); (the CEQA provisions are explained in 14 CAL. ADMIN. CODE § 15143 (West 1975)).

27. CAL. PUB. RES. CODE § 21100 (West Supp. 1976).

28. 42 U.S.C. § 4332(c) (1973).

29. 14 CAL. ADMIN. CODE § 15081 (West 1975).

30. CAL. PUB. RES. CODE § 21083 (West Supp. 1976).

31. *County of Inyo v. Yorty*, 32 Cal. App. 3d 795, 814, 108 Cal. Rptr. 377, 390 (1973).

32. *No Oil, Inc. v. City of Los Angeles*, 13 Cal. 3d 68, 86, 529 P.2d 66, 78, 118 Cal. Rptr. 34, 46 (1974) (footnotes by court omitted).

33. *Id.*

34. 14 CAL. ADMIN. CODE § 15083 (West 1975).

35. PPRO, *supra* note 5, at II-7.

The guidelines³⁶ provide that the written negative declaration will normally not be more than one page in length. While one California case³⁷ has taken the view that a negative declaration need not be in the form of a "mini-EIR," the federal cases tend to require some consideration of each of the elements in an EIS, thus making the negative declaration amount to a "mini-EIS."³⁸ In one case³⁹ in which the claim that there should have been an EIR was rejected, the court considered a negative declaration which described the reasons why there was a lack of significant impact; it also reviewed eighteen conditions that had been imposed in order to minimize adverse impacts as a result of consideration and adoption of the negative declaration. The project in question was a 24-mile long and eighteen-foot high fence, which was designed as an "art form" over mostly farmland and which was to be removed after 14 days with guarantees that the land would be returned to its exact prior state. The court's conclusion that there was no substantial and adverse impact upon the environment may have been stretched somewhat in order to protect an investment of \$1,400,000 which might have been lost by delays while an EIR was prepared. At the same time, the case suggests that the negative declaration and attending record demonstrated that each of the elements of the EIR were at least informally dealt with; it may be likely that in debatable situations the court will be willing to decide that the less formal and complete process will be sufficient.

Recent examples of determinations that an EIR is not required include a case⁴⁰ in which the court summarily concluded that the closing of a residential street did not necessarily mean that there would be a significant effect on the environment and, in the absence of showing an impact, the Council's determination was

36. 14 CAL. ADMIN. CODE § 15083 (West 1975).

37. *Hixon v. County of Los Angeles*, 38 Cal. App. 3d 370, 113 Cal. Rptr. 433 (1974).

38. See, e.g., *Simmans v. Grant*, 370 F. Supp. 5 (S.D. Tex. 1974).

39. *Running Fence Corp. v. Superior Ct. of Sonoma County*, 51 Cal. App. 3d 400, 124 Cal. Rptr. 339 (1975).

40. *Snyder v. City of South Pasadena*, 53 Cal. App. 3d 1051, 126 Cal. Rptr. 320 (1975). The case is interesting because it appears to involve a street closing to exclude traffic generated by another street in the City of Los Angeles so that what was considered to be excess traffic did not go through a residential area of the city of South Pasadena. The latter solved its own problem by closing or "barricading" part of its own street.

supported by substantial evidence. Another court⁴¹ has held that an EIR is not required for repair and maintenance of existing roads because that is a matter properly included within the categorical exemptions of the CEQA Guidelines.⁴²

A negative declaration may serve another purpose consistent with CEQA which has now been formally approved by at least one appellate case.⁴³ The assessment necessary to decide whether or not to prepare an EIR may disclose a negative impact which can then be worked out with the project applicant so as to mitigate it, with the result that the project will not have significant impact.⁴⁴ This practice may severely limit public review and may put the staff in an inappropriately powerful position.⁴⁵ While many federal cases⁴⁶ have considered the question of significant impact, it remains difficult to generalize about how the line is to be drawn.

Under CEQA, there is an additional threshold decision to be made based upon the distinction between discretionary acts,⁴⁷ which require exercise of "judgment, deliberation or discretion" and do require an EIR, and ministerial acts,⁴⁸ which require acting upon given facts and do not require an EIR.⁴⁹ Any doubts are to be resolved in favor of requiring an EIR.⁵⁰

41. *Erven v. Bd. of Supervisors of Riverside County*, 53 Cal. App. 3d 1004, 126 Cal. Rptr. 285 (1975).

42. 14 CAL. ADMIN. CODE § 15101(c) (West 1975). Other exemptions are included within the categorical exemptions of the CEQA Guidelines. *Id.* at §§ 15101 to 15115.

43. *Running Fence Corp. v. Superior Court of Sonoma County*, 51 Cal. App. 3d 400, 430, 124 Cal. Rptr. 339, 361 (1975).

44. ASS'Y LOCAL GOV'T COMM. REPORT, *supra* note 5 at 42.

45. See PPRO, *supra* note 5 at II-6.

46. *E.g.*, federal cases have held that: a renewal project which reduces density in an existing building and involves only cosmetic work on the outside of the existing buildings and is not significant, *Wilson v. Lynn*, 372 F. Supp. 934. (D. Mass. 1974); 3.4 miles of single lane gravel road which is the final connecting segment of a fire road is not significant, *Kisner v. Butz*, 350 F. Supp. 310. (N.D.W. Va. 1972); a sewage treatment plant which would improve water quality over present facilities is not significant, *Howard v. Environmental Protection Agency*, 4 ERC 1731 (W.D. Va. 1972); the mere condemnation of land by TVA for future use of an electric generating plant is not significant (a result based in part on the fact that the use was only a "possible" future use), *U.S. v. Three Tracts of Land*, 377 F. Supp. 631 (N.D. Ala. 1974); a 43 acre PUD is significant, *Gifford-Hill Co. v. FTC*, 389 F. Supp. 167 (D.D.C. 1974); an 81-unit Navy housing project is significant, *Fort Story v. Schlesinger*, 7 ERC 1141 (E.D. Va. 1974).

47. 14 CAL. ADMIN. CODE § 15024 (West 1975).

48. 14 CAL. ADMIN. CODE § 15032 (West 1975).

49. CAL. PUB. RES. CODE § 21080 (West Supp. 1976).

50. *People v. Dep't of Housing & Community Dev.*, 45 Cal. App. 3d 185, 119 Cal. Rptr. 266 (1975). See also *Plan for Arcadia Inc. v. Arcadia City Council*, 42 Cal. App. 3d 712, 117 Cal. Rptr. 96 (1974).

One particular regulatory activity which has created substantial controversy under this distinction is the issuance of grading permits. These permits can have very substantial impacts upon the environment, although some jurisdictions treat their issuance as ministerial. It has now been held that grading permits do require an EIR, at least where the city engineer has the power to impose conditions incidental to their issuance and other aspects of the issuance involve discretion, even though local guidelines may define such approval as ministerial.⁵¹ It has also been held that the requirement that zoning be consistent with the general or specific plans⁵² cannot make a rezoning to conform thereto ministerial because general statutes on zoning indicate that it is a discretionary act.⁵³

Both CEQA and NEPA apply to any kind of undertaking or project which will have significant effect upon the environment, whether it is an activity or project to be carried out directly by a government entity or is an activity to be carried out by a private concern pursuant to a permit or other authorization by a government entity. These acts can apply to such non-land use matters as the use of x-ray equipment to inspect persons and baggage boarding airplanes,⁵⁴ the offshore oil drilling of test wells,⁵⁵ and the issuance of certificates of convenience and necessity by the Public Utilities Commission.⁵⁶

IV. SOCIAL IMPACT AS "SIGNIFICANT IMPACT"

Although both NEPA and CEQA purport to have the goal of providing environmental conditions in which man can "fulfill the

51. *Day v. City of Glendale*, 51 Cal. App. 3d 817, 124 Cal. Rptr. 569 (1975).

52. CAL. GOV'T CODE § 65860 (West Supp. 1976).

53. *People v. County of Kern*, 39 Cal. App. 3d 830, 115 Cal. Rptr. 67 (1974).

54. *Nader v. Butterfield*, 373 F. Supp. 1175 (D.D.C. 1974).

55. *No Oil, Inc. v. City of Los Angeles*, 13 Cal. 3d 68, 529 P.2d 66, 118 Cal. Rptr. 34 (1974).

56. *Desert Environmental Conservation Ass'n v. Pub. Util. Comm'n*, 8 Cal. 3d 739, 106 Cal. Rptr. 31 (1973); see also *Wildlife Alive v. Chickering*, 53 Cal. App. 3d 808, 126 Cal. Rptr. 81 (1975) exempting the Fish and Game Commission from CEQA when the Commission is setting hunting season because of the court's conclusion that the Legislature's intent was to exempt the Commission and that CEQA does not apply to legislative acts, which the court found the setting of hunting season to be.

social, economic, and other requirements of present and future generations,"⁵⁷ the latter limits its definition of "environment" to purely physical concerns.⁵⁸ Since NEPA does not so clearly limit its concern to the physical environment and since reference is made in a number of places within NEPA to social concerns,⁵⁹ one of the circuits has decided on several occasions that the assessment of social impacts is an inherent part of the concern of NEPA. In one such case, where an outpatient clinic for drug users, the court required that an EIS be used for purposes of considering the effects of the project upon the "human environment" insofar as there might be a possibility of increased drug sales, drug use, crime, riots and other deleterious activities within the immediate area.⁶⁰

More recently, the Second Circuit has decided that NEPA requires a consideration of the social impacts arising from the planned financing of a low-income housing project by HUD within the what had originally been planned as a middle-income housing project. The court concluded that the federal agencies must use the EIS process to consider the following:

Site selection and design; density; displacement and relocation; quality of the built environment; impact of the environment on current residents and their activities; decay and blight; implications of the city growth policy; traffic and parking; noise; neighborhood stability; and the existence of services and commercial enterprises to serve the new residents.⁶¹

The court emphasized the need to consider alternatives to the particular project, especially since this is required by HUD's own regulations.

A federal trial court has required an EIS to assess the "effect of a youth facility on the human environment in a planned residential development in close proximity to a proposed elementary school."⁶² However, an attempt to use NEPA to assess the allegedly adverse social characteristics of persons who would live in a low-cost housing project to be financed by HUD has failed,⁶³ a result similar to that reached by a California court⁶⁴ when asked to

57. 42 U.S.C. § 4331(a) (1973); CAL. PUB. RES. CODE § 21001(e) (West Supp. 1976).

58. CAL. PUB. RES. CODE § 21060.5 (West Supp. 1976).

59. *E.g.*, 42 U.S.C. §§ 4332(A), 4332(B), 4341(3), 4342, 4344(4) (1973), referring to social and/or economic considerations.

60. *Hanly v. Kleindeinst*, 471 F.2d 823 (2d Cir. 1972).

61. *Trinity Episcopal School Corp. v. Romney*, 523 F.2d 88 (2d Cir. 1975).

62. *Tierra Santa Community Council v. Richardson*, 4 Env. L. Rptr. 20309 (S.D. Cal. 1973).

63. *Nucleous Homeowners v. Lynn*, 372 F. Supp. 147 (N.D. Ill. 1973).

64. *City of Orange v. Valenti*, 37 Cal. App. 3d 240, 112 Cal. Rptr. 379 (1974).

evaluate the social effects of establishing an unemployment office.

Thus far, with the exception mentioned earlier,⁶⁵ the California courts have not considered social and economic impact issues. The guidelines for CEQA require the balancing of economic and social factors, but make the inclusion of economic information in the EIR itself strictly discretionary.⁶⁶ Both the recently added requirement that the EIR include mitigation measures to reduce consumption of energy⁶⁷ and the requirement that growth inducing impact⁶⁸ be included suggest economic and social considerations going beyond strictly physical impacts. The positive aspects of social impact as overriding considerations in connection with adverse environmental impacts will be discussed further in later parts of the article.⁶⁹

V. RETROACTIVE APPLICATIONS AND PHASED PROJECTS

CEQA specifically provides, in its amendments following the decision in *Friends of Mammoth*,⁷⁰ that regulatory activities as well as public works projects are covered by CEQA, and that projects "undertaken, carried out, or approved" prior to December 5, 1972 need not comply with the environmental impact report processes under CEQA, except where they were under legal attack for violating CEQA prior to that date and substantial hardship would not follow from requiring an EIR.⁷¹ Thus, it has been held that a conditional use permit validly issued prior to that date can not be set aside because no EIR has been filed.⁷² However, just as NEPA

65. *Id.*

66. 14 CAL. ADMIN. CODE § 15012 (West 1975).

67. CAL. PUB. RES. CODE § 21000(3) (West Supp. 1976).

68. CAL. PUB. RES. CODE § 21000(7) (West Supp. 1976).

69. See *infra* note 139.

70. *Friends of Mammoth v. Bd. of Supervisors of Mono County*, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972).

71. CAL. PUB. RES. CODE §§ 21169 and 21179 (West Supp. 1976), interpreted in *Aries Develop. Co. v. California Coast. Zone Cons. Comm.*, 48 Cal. App. 3d 534, 122 Cal. Rptr. 315 (1975) and *Cooper v. County of Los Angeles*, 49 Cal. App. 3d 34, 122 Cal. Rptr. 464 (1975); *Friends of Lake Arrowhead v. San Bernadino Ct. Bd. of Supr's*, 38 Cal. App. 3d 497, 113 Cal. Rptr. 539 (1974); *Concerned Citizens of Palm Desert, Inc. v. Riverside Ct. Bd. of Supervr's*, 38 Cal. App. 3d 272, 113 Cal. Rptr. 328 (1974); *Plan for Arcadia, Inc. v. Arcadia City Council*, 42 Cal. App. 3d 712, 117 Cal. Rptr. 96 (1974).

72. *San Francisco Plan and Urban Renew. Ass'n v. Central Permit Bur.*, 30 Cal. App. 3d 920, 106 Cal. Rptr. 670 (1973); *Concerned Citizens of Palm*

has been interpreted in many instances to apply to projects which were well underway at the time the act was passed but about which there were still substantial decisions to be made,⁷³ CEQA has been applied in several instances, at least as far as public works are concerned, to assure that even though decisions have been made prior to the effective date, if there are additional decisions to be made after the date, then an EIR will be required as to those subsequent decisions. For example, CEQA has been applied to a groundwater system for the city of Los Angeles where aqueducts for the system were nearly completed and half of the monies allocated for wells were spent prior to the enactment of CEQA. The court in that case required an EIR in order to allow an assessment of the balance of the project, including an assessment of plans to increase the use of existing and proposed wells, which use could adversely affect the water supply of complaining farmers.⁷⁴ Similarly, an EIR was required where a highway project was fully approved by the California Division of Highways prior to the effective date of CEQA, but for which only a small portion of acquisition costs had been paid and for which construction funds had not been authorized.⁷⁵

Where a part of a project has been completed but there are still future parts involving decision making, an EIS may be required even though construction has proceeded so far that the project cannot be reconsidered as a whole. The rationale is that the EIS can still be used to shape future increments so that adverse environmental impacts are minimized.⁷⁶

On the other hand, it has been held that when a building permit has been issued prior to the effective date of CEQA and thus is protected by the grandfather provisions of CEQA, a subsequent attempt to have the building approved for condominium use has no effect on the environment as such.⁷⁷ It was reasoned that if the

Desert, Inc. v. Riverside City Board of Supervisors, 38 Cal. App. 3d 272, 113 Cal. Rptr. 328 (1974).

73. *E.g.*, Keith v. California Highway Comm'n, 506 F.2d 696 (9th Cir. 1973); Keith v. Volpe, 352 F. Supp. 1324 (S.D. Cal. 1972); Northside Tenants' Rights Coalition v. Volpe, 346 F. Supp. 244 (E.D. Wis. 1972); Lathan v. Brinegar, 506 F.2d 677 (9th Cir. 1974); Minnesota Citizens Ass'n v. AEC, 4 ERC 1876 (D. Minn. 1972).

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

75. Dep't of Pub. Works v. Bosio, 47 Cal. App. 3d 495, 121 Cal. Rptr. 375 (1975); prior opinion at 36 Cal. App. 3d 586, 111 Cal. Rptr. 789 (1974).

76. Jacarilla Apache Tribe v. Morton, 471 F.2d 1275 (9th Cir. 1973); see also, Environmental Defense Fund v. Tenn. Valley Authority, 468 F.2d 1164 (6th Cir. 1972); Barta v. Barinegar, 358 F. Supp. 1025 (W.D. Wis. 1973).

77. Pacific Palisades Prop. Own. Ass'n v. City of Los Angeles, 42 Cal. App. 3d 781, 117 Cal. Rptr. 138 (1974).

conversion of an apartment to a condominium cannot be considered to so significantly affect the environment as to require the preparation of an EIR,⁷⁸ then once an original building permit has vested, such a conversion is no different from converting an existing building to a condominium, even though demolition of the old building and excavation has been undertaken. In making the decision as to whether a potentially retroactive application of CEQA is to be made, the court may look to the strong environmental policies of the act and reason for application, if possible, because of the strong public interests involved.⁷⁹

Where two buildings were planned in the same leased area, and the first was protected by a permit issued prior to the effective date of CEQA, the second building was not required to be assessed in terms of the possibility of building elsewhere, since the protection of the first building extended to that extent to the second.⁸⁰

Both the cases under NEPA⁸¹ and the CEQA Guidelines⁸² require that, in a phased project, consideration must be given to the environmental impact of each segment of the project as well as to the whole. Where the segment of a highway is long enough to have an independent usefulness because it ends in logical terminal points, it can be assessed by itself.⁸³ Similarly, a reservoir which has independent utility can be assessed independently of the balance of a Corps of Engineers overall river project,⁸⁴ but a dredging project which will lead *inevitably to other projects must be considered along with the other project.*⁸⁵

VI. ADEQUACY OF THE EIR AND EIS

Many of the cases cited throughout this article, as well as many federal cases too numerous to mention, have dealt in one way or

78. 14 CAL. ADMIN. CODE § 15037 (a) (West 1975).

79. See *Environmental Law Fund, Inc. v. Town of Corte Madera*, 49 Cal. App. 3d 105, 122 Cal. Rptr. 282 (1975).

80. *Bresnahan v. City of Pasadena*, 48 Cal. App. 3d 297, 121 Cal. Rptr. 750 (1975).

81. *Monroe County Conservation Council v. Volpe*, 472 F.2d 693 (2d Cir. 1972); *Thompson v. Fugate*, 347 F. Supp. 120 (E.D. Va. 1972).

82. 41 CAL. ADMIN. CODE § 15069 (West 1975).

83. *Indiana Lookout Alliance v. Volpe*, 484 F.2d 11 (8th Cir. 1973); see also *Movement Against Destruction v. Volpe*, 361 F. Supp. 1360 (D.C. Md. 1973).

84. *Sierra Club v. Callaway*, 499 F.2d 982 (5th Cir. 1974).

85. *Wisconsin v. Callaway*, 371 F. Supp. 807 (W.D. Wis. 1974).

the other with the question of what data should be included within the environmental impact report or statement. For example, the cases which deal with the threshold issue of whether or not there is a potential significant impact⁸⁶ so that an EIR or EIS must be prepared demonstrate the type of data to be included; those matters brought to the court's attention as indicating that an assessment must be made are the very matters which must in turn be adequately described once an EIR or EIS is prepared. The case law demands that the EIR and EIS include all actual physical environmental impacts that are relatively serious and have a firm basis in fact. Of course, the extent of data required is not a question which can be resolved by general principles, since it is essentially a question of fact, that is, in each instance, everything must be considered which is actually or potentially a serious threat to the environment. Statements of fact about the presence or absence of environmentally sensitive wildlife, vegetation or other matters within the area of the project must not be simply conclusionary, but must be supported by studies which were undertaken specifically for purposes of the EIS or were available because carried out by someone else at some other time.⁸⁷

VII. RELATIONSHIP OF THE EIR AND EIS TO THE DECISION REACHED

Most of the judicial concern has been with issues other than the basic and most important issue of how data on the environment, which so far has been limited primarily to the physical environment, is to be used in the decision-making process. At a minimum, the cases on adequacy of the EIS and EIR make it clear that NEPA and CEQA are full disclosure laws. The following language is somewhat typical of that used in federal cases considering the question:

The 'detailed statement' required by § 102(2) (c) should, at a minimum, contain such information as will alert . . . [interested persons], to all known *possible* environmental consequences of proposed agency action. Where experts, or concerned public or private organizations, or even ordinary lay citizens, bring to the attention of the responsible agency environmental impacts which they contend will result from the proposed agency action, then the § 102 statement should set forth these contentions and opinions even

86. See *supra* note 46.

87. *San Francisco Ecology Center v. City and County of San Francisco*, 48 Cal. App. 3d 584, 595, 122 Cal. Rptr. 100, 107 (1975); however, a study which was not intended as an EIR may not be used to fill the void, at least if it lacks any of the essential elements. *Environmental Law Fund, Inc. v. Town of Corte Madera*, 49 Cal. App. 3d 105, 122 Cal. Rptr. 282 (1975).

if the responsible agency finds no merit in them whatsoever. Of course, the § 102 statement can and should also contain the opinion of the responsible agency with respect to all such viewpoints. The record should be complete. Then, if the decision makers choose to ignore such factors, they will be doing so with their eyes wide open.⁸⁸

But NEPA contemplates more than simply making data available. While its language is very general, it does describe a rational system to be used and clearly intends that agencies:

Utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment.⁸⁹

Thus, under NEPA the language of the act itself requires the balancing. Although CEQA does not have such language, we shall see that the California courts have come to use the same kind of analysis. Many NEPA cases require that in making decisions there must be a systematic balancing of environmental costs and technical-economic benefits. The court's role is to assure that the agency has before it complete information in the form of an EIS and that the EIS is used in the decision making process. An important early case, that of *Calvert Cliffs*, stated:

NEPA requires that an agency must—to the fullest extent possible under its other statutory obligations—consider alternatives to its actions which would reduce environmental damage. That principle establishes that consideration of environmental matters must be more than a *pro forma* ritual. Clearly, it is pointless to “consider” environmental costs without also seriously considering action to avoid them. Such a full exercise of substantive discretion is required at every important, appropriate and non-duplicative stage of an agency's proceedings.⁹⁰

The balancing that the cases require is in many ways best understood as an aspect of considering alternatives. The “do nothing” alternative, the alternative of the first proposal and all other reasonable alternatives can more readily be assessed against each other rather than in the abstract. Clearly, the EIS must consider all alternatives which are in some sense reasonable.⁹¹

88. *Environmental Defense Fund, Inc. v. Corps of Engineers of United States Army*, 325 F. Supp. 749, 759 (E.D. Ark. 1971).

89. 42 U.S.C. § 4332(A) (1973).

90. *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1128 (D.C. Cir. 1971).

91. *Friends of the Earth v. Coleman*, 518 F.2d 323 (9th Cir. 1975); *I-291 Why? Ass'n v. Burns*, 372 Supp. 223 (D. Conn. 1974).

Many of the federal cases, and in particular, the *Calvert Cliffs'* decision, demonstrate clearly that the courts expect the final EIS to be a written explanation of why a particular decision was reached. Adverse environmental costs must either be explained away or a rationale must be set forth as to why the agency undertaking or regulating the project is willing to proceed in the face of such costs.

Whatever may be the actual practice under NEPA, when we turn to CEQA, the studies of the EIR process suggest, as do the cases shortly to be discussed, that EIRs are not only often factually inadequate but they also often fail to include the reasoning process by which the decision was reached. With the EIR, local government decision-making bodies are often presented either with an EIR which does not recommend any decision or with one which recommends a different decision than the one actually reached. In practice the EIR is considered along with other data, frequently presented in oral form at a hearing, and a decision is reached based upon some combination of factors which may not all be included within the EIR. Moreover, the EIR may not include the balance which was struck nor the reasons for the decision in terms of trade-offs or in any other terms. Yet California opinions and the CEQA guidelines⁹² also point to the need to relate the final EIR to the actual decision reached.

One of the earliest California cases stated:

[It] should be understood that whatever is required to be considered in an EIR must be in that formal report; what any official might have known from other writings or oral presentations cannot supply what is lacking in the report.⁹³

The only method of gaining an appreciation of the full impact of this insistence that the rational decision-making process is one not only of full disclosure but also of a demonstrated consideration of the matters disclosed by a process of considering and trading off the adverse consequences is by reading the opinions, but some of this can be captured from brief excerpts. For example, in *People v. County of Kern*, one of the more strongly worded opinions, the court said that not only must all actual data be included, but that

[t]he policy of citizen input that underlies the act supports the requirement that the responsible public officials set forth in detail

92. 14 CAL. ADMIN. CODE § 15012 (West 1975).

93. *Environmental Defense Fund, Inc. v. Coastside County Water District*, 27 Cal. App. 3d 695, 706, 104 Cal. Rptr. 197, 203 (1972); the new EIR was subsequently held adequate, *Environmental Defense Fund, Inc. v. Coastside County Water Dist.*, 28 Cal. App. 3d 512, 104 Cal. Rptr. 714 (1972); see also *Russian Hill Improvement Association v. Board of Permit Appeals*, 44 Cal. App. 3d 158, 118 Cal. Rptr. 490 (1974).

the reasons why the economic and social value of the project, in their opinion, overcomes the significant environmental objections raised by the public.⁹⁴

The language of one federal case has been cited several times by California courts:

Finally, and perhaps most substantively, the requirement of a detailed statement helps insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug. A conclusory statement 'unsupported by empirical or experimental data, scientific authorities, or explanatory information of any kind' not only fails to crystalize issues [citation omitted] but 'affords no basis for a comparison of the problems involved with the proposed project and the difficulties involved in the alternatives.' [Citation omitted] Moreover, where comments from responsible experts or sister agencies disclose new or conflicting data or opinions that cause concern that the agency may not have fully evaluated the project and its alternatives, these comments may not simply be ignored. *There must be good faith, reasoned analysis in response.* [Emphasis added.]⁹⁵

Language which strongly insists on not only the accumulation of data but also on the rationalization of the actual decision reached can be found in *Burger v. County of Mendocino*.⁹⁶ In that case, the EIR listed many adverse effects, recommended against a developer's proposed motel and recommended a slightly smaller motel with certain relocations. The planning department made a similar recommendation, but also recommended certain further study. Following a public hearing, the County Board by resolution found the EIR adequate and its own consideration thereof full and adequate. It further found that the general welfare and the public interest would best be served by approval without further modification. The court stated:

Although the resolution recites that the board 'has made a full consideration' of the EIR, it nowhere refers in any way to the adverse environmental effects clearly pointed out by that report. It nowhere suggests that such adverse effects in fact are non-existent, nor does it point, even in generality, to overriding economic or social values of the motel.

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

95. *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973) as cited in *People v. County of Kern*, 39 Cal. App. 2d 830, 841, 115 Cal. Rptr. 67, 75 (1974) and *Russian Hill Improvement Association v. Board of Permit Appeals*, 44 Cal. App. 2d 830, 841, 115 Cal. Rptr. 490, 498 (1974).

96. *Burger v. County of Mendocino*, 45 Cal. App. 3d 322, 119 Cal. Rptr. 568 (1975).

The legislative intent was "that environmental considerations play a significant role in governmental decision making [citation omitted] and that such an intent was not to be effectuated by vague or illusory assurances by state and local entities that the effect of a project on the environment had been 'taken into consideration'" (*Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247, 263, 104 Cal. Rptr. 761, 771, 502 P.2d 1049, 1059). This guideline seems particularly appropriate where a board of supervisors overrides the adverse recommendation of an EIR, buttressed by like objections from the county planning department. We do not, of course, suggest that 'findings' must be made with the formality attached to that term in judicial proceedings, but here there is no hint, however remote, of any reason for rejecting the adverse recommendations. Judicial review, specifically provided for, cannot be had in such a void.

Moreover, there is no evidence to meet the mass of engineering and other data supporting the EIR. Counsel for the developer did state to the board that the alternative principally recommended by the EIR and the planning department was not feasible economically, and one witness assumed the same, although disclaiming any experience or expertise in that field. There is no estimate of income or expenditures, and thus no evidence that reduction of the motel from 80 to 64 units, or relocation of some units, would make the project unprofitable.⁹⁷

These cases demonstrate the need to balance environmental costs against other costs. CEQA itself does not directly prescribe this balancing process, although it does make a somewhat vague reference to the need of all government agencies at all levels of government "to consider qualitative factors as well as economic and technical factors and long-term benefits and costs, in addition to short-term benefits and costs and to consider alternatives to proposed actions affecting the environment."⁹⁸ It also provides that "major consideration is given to preventing environmental damage." As previously indicated,⁹⁹ this has caused on California Court of Appeal to reason that the NEPA cases are of "diminished value" because of differences in language between NEPA and CEQA, which the court required greater consideration to be given to the physical environment, a result also found to be based upon the legislative history of CEQA.¹⁰⁰

The same case¹⁰¹ points out that neither NEPA nor CEQA require that the balancing to be done must be in the formal style of a cost/benefit analysis, citing several federal cases so holding. While this technique is used by such federal agencies as the Corps

97. *Id.* at 326, 119 Cal. Rptr. at 570.

98. CAL. PUB. RES. CODE § 21001(g) (West Supp. 1976).

99. *San Francisco Ecology Center U. City v. City of San Francisco*, 48 Cal. App. 3d 584, 590, 122 Cal. Rptr. 100, 104 (1975).

100. *Id.* at 591, 122 Cal. Rptr. at 104 (1975).

101. *Id.* at 595, 122 Cal. Rptr. at 107.

of Engineers, it is so used because of other statutory authority. Apparently, there has been an increased use of cost benefit analysis, particularly by federal agencies, because the balancing process suggests that actually quantifying in monetary terms is one way to "balance" the pros and cons. However, the state of the art has not developed sufficiently, to permit acceptable certainty as the monetary value of environmental factors. Perhaps the state of the art will so develop.

That the guidelines to some extent followed the earlier cases and anticipated the later ones is not surprising; the NEPA cases were clear. More importantly, there is probably no practical way to implement the goals of CEQA other than by treating CEQA as not absolutely mandating no environmental damage—an impossible task—and as requiring that the negative impacts be given appropriate weight. Thus, the guidelines provide:

In particular, the major issues raised when the Lead Agency's position is at variance with the recommendations and objections raised in the comments must be addressed in detail giving reasons why specific comments and suggestions were not accepted, and factors of overriding importance warranting an override of the suggestions.¹⁰²

The actual use of EIRs falls far short of this judicial ideal. For example, one study indicates that in only seven percent of the EIRs studied were favorable impacts described, and these mostly were for public projects.¹⁰³ To the extent that most EIRs will have negative impacts and neither the EIR nor any formally approved document includes the overriding policy considerations, the California courts would seem forced to enjoin most EIR projects if faced with an opportunity to do so. This balancing seems to be at the very heart of why the EIR process has some hope of achieving rationality, yet it does not seem to be carried out in this spirit.

VIII. PARTICIPATION BY THE PUBLIC AND OTHER AGENCIES

The requirements that adequate data be made available to the decision maker and that the decision maker use that data is further demonstrated by the roles which CEQA and NEPA provide for government agencies and the general public. NEPA requires that:

102. 14 CAL. ADMIN. CODE § 15146(b) (West 1975).

103. ASS'Y LOCAL GOV'T COMM. REPORT, *supra* note 5 at 44.

"Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved."¹⁰⁴ Copies of the statement are to be made available to federal, state and local agencies as well as the public, the President and the Council on Environmental Quality.¹⁰⁵ The Ninth Circuit has held that a city has standing to object to a negative declaration in part because of the NEPA requirement that it have an opportunity to comment in an EIS, of which such an entity cannot be deprived.¹⁰⁶

The language of CEQA is in some respects permissive rather than mandatory in this regard:

Prior to completing an environmental impact report, the responsible state agency shall consult with, and obtain comments from, any public agency which has jurisdiction by law with any person who has special expertise with respect to any environmental impact involved.¹⁰⁷

The CEQA guidelines make full public participation a "widely accepted desirable goal."¹⁰⁸ Prior to CEQA, participation by the public was "irregular and limited."¹⁰⁹

The courts' recognition of the positive role that public participation plays materializes in a number of contexts. It has already been mentioned that expressions of public concern play an important role in making the use of a *full* EIR rather than a simple negative declaration desirable; use of the former helps allay the fears of an apprehensive public.¹¹⁰ Courts have also recognized that the public has a right to know what social and economic factors have overcome environmental objections.¹¹¹ Moreover, perhaps because of the recognition that a public hearing is itself not necessarily the most rational process, the draft EIR must be available to the public well in advance of any public hearing and the opportunity to make only verbal comment at a single public hearing would seem inadequate.¹¹²

104. 42 U.S.C. 4332(c) (1973).

105. *Id.*

106. *City of Davis v. Coleman*, 521 F.2d 661 (1975).

107. CAL. PUB. RES. CODE § 21104 (West Supp. 1976).

108. 14 CAL. ADMIN. CODE § 15164 (West 1975). *See also* §§ 15065 and 15085(d).

109. ASS'Y LOCAL GOV'T COMM. REPORT, *supra* note 5 at 14.

110. *See supra* note 32 and accompanying text.

111. *See supra* note 94 and accompanying text.

112. *See Russian Hill Improvement Association v. Board of Permit Appeals*, 44 Cal. App. 2d 158, 171, 118 Cal. Rptr. 490, 498 (1974) citing several other cases.

Public involvement in the process is justified; such involvement increases the likelihood of accuracy in the development of factual data and demonstrates the rationality of that process. Public involvement also has potential political impact in protecting the environment from unnecessary degradation through the political processes:

Only by requiring the County to fully comply with the letter of the law can a subversion of the important purposes of CEQA be avoided, and only by this process will the public be able to determine the environmental and economic values of their elected and appointed officials, thus allowing for appropriate action come election day should the majority of the voters disagree.¹¹³

One study has estimated that some sort of public input occurred either in response to the draft EIR or at a hearing in fifty percent of the EIRs, which in turn, included twenty-five percent of the total number of impacts.¹¹⁴ The same study also reports that of the identifiable impacts raised in all EIRs, five percent either were considered for the first time as a result of that input or made more accurate.¹¹⁵

The courts' desire to have the greatest possible input to protect general public interest is also reflected in the way that certain administrative rules have been applied. While it is generally agreed that failure to raise within a reasonable time before an administrative agency any objection being raised before a court will be barred by laches¹¹⁶ because of delay or failure to exhaust administrative remedies,¹¹⁷ the fact that the objector is asserting a public interest has caused courts to refuse to apply these doctrines.¹¹⁸ The courts have reasoned that to apply the doctrine

113. *People v. County of Kern*, 39 Cal. App. 3d 830, 842, 115 Cal. Rptr. 67, 75 (1974).

114. *Ass'y LOCAL GOV'T COMM. REPORT*, *supra* note 5 at 42.

115. *Id.*

116. *Breshnaha v. City of Pasadena*, 48 Cal. App. 3d 297, 121 Cal. Rptr. 750 (1975).

117. *Running Fence Corp. v. Superior Court of Calif., County of Sonoma*, 51 Cal. App. 3d 400, 124 Cal. Rptr. 339 (1975); *Concerned Citizens of Palm Desert v. Riverside Court Board of Supervisors*, 38 Cal. App. 3d 257, 113 Cal. Rptr. 328 (1974).

118. *Environmental Law Fund, Inc. v. Town of Corte Madera*, 49 Cal. App. 3d 105, 122 Cal. Rptr. 282 (1975); *People v. Department of Housing and Community Development*, 45 Cal. App. 3d 185, 119 Cal. Rptr. 266 (1975).

would impute to the general public the alleged "fault" of the particular objector.

IX. PRACTICAL PROBLEMS IN ACHIEVING THE POLICIES OF CEQA

A. *The Theoretical Framework for Governmental Decision Making*

Students of public administration and political science who seek a model for understanding political decision-making sometimes contrast a rational or lineal model with an equilibrium, political or "clout" model.¹¹⁹ The former assumes a decision making process, usually with relatively centralized authority, which allows for goal setting, fact gathering, adequate evaluation of alternatives (sometimes in the form of cost/benefit analyses), a rationally derived decision and re-evaluation by feedback. The latter assumes that sufficient data could not be gathered; that causes and effects are too complex to be understood; that centralized power is undesirable, impractical and likely to become self-serving and bureaucratic; and that compromises among competing interests, each with some political power, will ultimately produce the "better" decision.

The EIR/EIS process combines both approaches. As a rational model, it seeks accurate data and a reasoned choice among understandable alternatives. As a political model, it seeks cooperation and input from various government and private agencies as well as from the general public and is recognized as having an inherent value because of this access. Whether the courts realize it or not, they have been applying CEQA and NEPA to accomplish both of these, although in the real world the theoretically distinct models are by no means that clearly distinguishable. The rational model,

119. Both models assume that government will regulate in a substantial manner, so the question is how to control and improve the government decision making process, or at least how to understand it. The author is well aware of a belief, which is attracting an increasing number of advocates, as well as evangelists, that application of economic theories suggests that government regulation is likely to fail to achieve its goals. Instead, the more or less inevitable result is less "efficiency" and the "minimizing" of resources. That is not the appropriate forum for a full economic analysis of CEQA, as applied to private land use regulation. Public choice theorists will undoubtedly do more of this. Neither of the cited studies of the EIR process purports to study the full effect of CEQA on the distribution of wealth. Neither purports to evaluate the extent to which the impacts being mitigated by EIRs are "externalities". This author assumes that the political choice to have public control of land use through the process described in the article has been made and that the accomplishment of the policies of CEQA are thus presumed to be desirable. Perhaps a reconsideration in economic terms will come at a later date.

at least as seen in the acts in question, depends upon other agencies and the public generally for its gathering of adequate data and for its demonstration on the face of the EIR or EIS that the process was indeed a rational, balancing one. The political aspects of the process depend at least in part upon the availability of adequate information in order to be politically effective.

While CEQA and NEPA represent an attempt to improve the process of decision-making and the content of the decisions made across a broad spectrum of government agencies and varied types of decision-making, the court cases demonstrate the frequent failure to achieve that goal. But the court cases are but the tip of an iceberg which can only be viewed pessimistically by those who are basically sympathetic to the goals of CEQA. For example, it appears that agencies which are required to follow the EIR process in appropriate circumstances are sometimes willing to admit that they disagree with the desirability of that process.¹²⁰ Agencies which are required to prepare guidelines¹²¹ for governing local practices have sometimes totally failed to do so or have done so in such meaningless terms that neither the developer, the public, or the government itself knows what is expected under the act.¹²² Agencies which are supposed to prepare EIRs apparently have approved projects without EIRs where at least some of the projects must have had significant impact. As the cases and studies indicate, laws of such broad scope as CEQA did not have an automatic impact upon the decision-making process.

To a large extent the effectiveness of the process depends upon the bringing of individual lawsuits both in order to clarify legal responsibilities and to bring home as forcefully as possible to the particular litigants the extent to which they have failed to live up to their legal responsibilities. The resources for instituting such lawsuits, however, are limited. One very substantial source of litigation potential is the California Attorney General's power to

120. See for example, CALAFCO Newsletter of the California Association of LAFCOS, Vol. II No. 4, December 1975 where it is reported that, while CEQA applies to the government bodies responsible for approving annexations and incorporations, 15 of the 43 agencies responding recommended that they be totally exempted and another 10 recommended a qualified exemption.

121. CAL. ADMIN. CODE § 15050 (West 1975).

122. See PPRO, *supra* note 5 at III-30.

enforce environmental legislation by virtue of express statutory authority to do so.¹²³ In fact, the Attorney General¹²⁴ has been involved with many of the California cases both as a moving party and as a participant where there is another plaintiff. A county district attorney may also represent the people against another agency.¹²⁵ Public interest law firms and citizens' groups have also contributed to the case law which has been so favorable to CEQA's expansive implementation. However, these groups have limited resources and cannot supervise the land use decision-making process in each and every one of the many local jurisdictions with power over land use. Should the California Supreme Court ultimately decide that successful plaintiffs are entitled to attorneys' fees, this would provide both the funding for additional suits as well as some additional "clout" because of the threat of such costs. However, as of this writing the issue is unsettled. Such costs have been denied with leave to make a proper motion to the trial court in several of the leading cases.¹²⁶ The United States Supreme Court has, however, decided that such fees are not available under NEPA in the absence of express statutory authority.¹²⁷

Most of the NEPA cases have involved public works projects or specialized regulatory agencies such as those regulating nuclear power or dredging in public waters. Thus, not only are the land use decision-makers not faced with realistic threats of litigation, but even those who seek to avoid lost lawsuits still find that the law in regard to private land use regulation is very limited and thus uncertain. Perhaps the Legislature could be asked to provide funding or state guidance as an alternative method of encouraging compliance without the necessity of lawsuits.

B. Scope of Review

Even where a lawsuit is brought, court review of the ultimate substantive decision is a very limited one. As to other issues that

123. CAL. GOV'T CODE § 12600-12612 (West Supp. 1976). See Wagoner, *Environmental Protection in California; Court Powers of State and Local Government Attorneys*, 14 SANTA CLARA LAWYER 296 (1974).

124. See Younger, *Environmental Protection in California, Perspective of the Attorney General*, 5 PAC. L.J. 19 (1974).

125. See *People v. Department of Housing & Community Development*, 45 Cal. App. 3d 185, 119 Cal. Rptr. 266 (1975).

126. *Bozung v. Local Agency Form. Com'n of Ventura City*, 13 Cal. 3d 482, 531 P.2d 783, 119 Cal. Rptr. 215 (1975); *No Oil, Inc. v. City of Los Angeles*, 13 Cal. 2d 486, 531 P.2d 783, 119 Cal. Rptr. 216 (1975); *Dept. of Public Works v. Bosio*, 47 Cal. App. 3d 495, 121 Cal. Rptr. 375 (1975).

127. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

have been brought before the court, such as questions of whether the acts are to be retroactively applied, whether an EIR or EIS need be prepared at all, and whether adequate data is presented, the administrative decisions seem to be looked at quite closely by the court, sometimes without the usual expressions of judicial reluctance to get involved in evaluating administrative and legislative processes. For example, one circuit, when faced with uncontroverted facts, has said that the trial court's findings of fact in no way bind the appellate court because, with uncontroverted facts, the only questions for review are legal ones which are the responsibility of the appellate court,¹²⁸ a conclusion with which the dissenting judge disagreed rather strongly since he believed that the appellate court was actually also drawing factual inferences contrary to those of the trial court. But if there are contradictions, the decision to use only a negative declaration has been sustained as being supported by "substantial evidence," thus leaving the resolution primarily to the decision-making local government agency.¹²⁹ However, the abuses to which the courts have been addressing themselves are normally treated as being relatively extreme abuses and thus the review may be of limited scope. Once the statement is adequate both in terms of data and its demonstrated balancing and rationalization process, the scope of review will clearly be limited.

A leading federal case has pointed out that

[R]eviewing courts probably cannot reverse a substantive decision on its merits, . . . unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values.¹³⁰

Most of the federal cases considering the scope of review necessary for a final decision trace their conclusions back to a pre-NEPA United States Supreme Court holding that the reviewing court must determine whether the agency acted within the scope of its authority and that it must find

[T]hat the actual choice made was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5

128. *Aries Dev. Co. v. California Coastal Zone Conservation Comm'n*, 48 Cal. App. 3d 534, 122 Cal. Rptr. 315 (1975).

129. *Plan for Arcadia, Inc. v. Arcadia City Council*, 42 Cal. App. 3d 712, 117 Cal. Rptr. 96 (1974).

130. *Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n*, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

U.S.C. § 706(2)(A) (Supp. V). To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.¹³¹

Despite some questions about the 8th Circuit's position, which has suggested a broader standard of review,¹³² the federal cases are coming into general agreement that the review is indeed the limited one described above.¹³³ Even when the court states that the scope of review of the EIS is a limited one, the detail with which the court actually reviews the EIS may suggest that the court is in reality substituting its own judgment for that of the agency. Necessarily if there is a long record, the court has had an opportunity to look at the matter completely. Presumably, however, the court does indeed exercise the restraint which it claims, as witnessed by the fact that there may be no cases yet in which an actual substantive decision has been reversed on the merits as being an abuse of discretion or in which the court has itself imposed conditions or alternatives to an approved action, although there have been many chances to do so. The closest thing to an actual review on the merits may be a recent consent decree where, following two years of litigation, highway officials agreed to abandon forty-four of a highway's original fifty-eight miles where objections had been raised by environmentalists and commercial fishing interests because of the highway's possible effects on wetlands.¹³⁴

In California, CEQA itself provides the standard for review:

In any such action, the court shall not exercise its independent judgment on the evidence but shall only determine whether the Act or decision is supported by substantial evidence in light of the whole record.¹³⁵

CEQA further defines the standard for judicial review by incor-

131. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

132. See *Environmental Defense Fund v. U.S. Corps of Engineers*, 470 F.2d 289 (8th Cir. 1972).

133. The following cases are among the many that have considered the issue: *Conservation Council of N.C. v. Froehlke*, 473 F.2d 664 (4th Cir. 1973); *Sierra Club v. Lynn*, 502 F.2d 43 (5th Cir. 1974); *Wyoming Council v. Butz*, 484 F.2d 1244 (10th Cir. 1973); *I-291 Why? Ass'n v. Burns*, 372 F. Supp. 223 (D. Conn. 1974); *Sierra Club v. Lynn*, 364 F. Supp. 223 (W.D. Tex. 1973); *Fayetteville Area Chamber of Commerce v. Volpe*, 386 F. Supp. 572 (E.D.N.C. 1974).

134. *Ecology Center of Louisiana v. Coleman*, summarized in 6 ENV. RPTER., CURRENT DEV. 1654 (1976).

135. CAL. PUB. RES. CODE § 21168 (West Supp. 1976).

poration of provisions of the California Code of Civil Procedure, which provides in part that the inquiry

shall extend to the questions whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.¹³⁶

Numerous California cases have not held that the scope of review is a limited one. This includes the scope of review of the decision to use a negative declaration rather than a full EIR.¹³⁷

So far, California appellate courts have not found any abuse of discretion requiring reversal or modification of a decision which is otherwise based upon an adequate EIR. As with the NEPA cases, in all of the cases where the decision makers have been reversed or enjoined, there have been abuses of the process rather than substantive abuses.

C. Conflicts with Social Value

If it is sensible to consider environmental tradeoffs before decisions are made, it is equally sensible to more formally recognize the practice of including social, economic¹³⁸ and even psychological tradeoffs in the same decision-making process. To the extent that the purpose of CEQA is to achieve a rational decision-making process through which the decision maker is made consciously aware of the quantifiable and qualitative environmental advantages and disadvantages in choosing among alternatives, it is equally reasonable to maximize the extent to which that same decision maker is aware of other consequences and tradeoffs involved in the same decision. CEQA seeks representation from the public, private individuals and other agencies so that each may contribute to the decision-making process. It seems equally appropriate that the spokesman for other than physical environmental values should

136. CAL. CODE OF CIV. PRO. § 1094.5 (West Supp. 1976).

137. See *Running Fence Corp. v. Superior Court of Cal. City of Sonoma*, 51 Cal. App. 3d 400, 418, 124 Cal. Rptr. 339, 352, (1975).

138. See Comment, *The Compatibility of Economic and Environmental Objectives in Government Decision Making*, 5 PAC. L.J. 92 (1974).

have an opportunity to be heard. Environmental advantages may frequently be achieved at the cost of not only employment arising from a project which may be rejected or cut back, but also at the long-term cost of lost employment that the completed project might provide. Environmental considerations may be used deliberately to exclude low income families¹³⁹ in that the result of environmentally imposed limitations upon housing may create housing scarcities and thereby increase the cost of the housing. Particularly in the consideration of alternatives might lie the acceptance of those projects which are most likely to provide environmental protection as well as certain other social economic needs. A multiple assessment system has been recommended by others as well.¹⁴⁰

It is not surprising, in this context, that a number of cases involve civil rights groups and environmental groups on opposite sides of the same issue. For example, the Audubon Society seeking to preserve a wetland has found itself at odds with a local N.A.A.C.P. seeking permanent jobs for 10,000 employees.¹⁴¹ Since such conflicts can be expected to increase, the courts and the Legislature will have to resolve them.

D. The Energy and Economic Crises

Congress exempted the Alaska pipeline from NEPA in order to expedite a partial solution to the "energy crisis" but chose not to modify NEPA itself, so NEPA may withstand, at least over the short haul, further pressure to eliminate it or to cut back on its effectiveness in providing environmental protection. While CEQA has withstood pressures within the Legislature to change it radically, the current situation suggests that it could go either way. Cost consciousness and the general economic situation can be expected to put additional strain upon the attempts to protect the physical environment. Perhaps CEQA is sufficiently entrenched and prudently used by all concerned so that it can withstand such pressures. Attempts to assess its actual impact both in terms of cost and delays are modest. Admittedly, it is not possible to separate out the costs and delays attributable to CEQA from those that are attributable to general economic conditions, high interest rates and resulting scarcity of funds for further development, seemingly disproportionate increases in costs in the construction business, other

139. See Daffron, *Using NEPA to Exclude the Poor*, 4 ENVIRONMENTAL AFFAIRS 81 (1975).

140. See PPRO, *supra* note 5 at II-3.

141. Florida Audubon Society v. Callaway, 44 ENVIRONMENTAL RPRT. CURRENT DEVELOPMENTS at 1648.

environmental legislation, particularly the coastal zone initiative, and so on.¹⁴² Some of the costs are start-up costs, particularly as to delays while procedures were developed, so the costs may decrease over time. Perhaps more importantly, if the local government decision-making process had been a rational, deliberative and open process under existing procedure, the addition of these elements into that decision-making process by way of CEQA might well have caused much less delay and indirect and direct costs.¹⁴³ To put it facetiously, it was probably cheaper *in the short run* to know little about either what was actually being decided or why.

Whether caused by the necessary process of gathering and evaluating data, by what has been suggested sometimes to be the over-utilization of CEQA¹⁴⁴ or by inefficiencies in government, delays cost money in both public and private sectors; unless the procedures are streamlined and needless lawsuits can be avoided, even if the ideal of CEQA was a valid one, it will fall of its own weight.

E. Integration of CEQA into the Land Use Planning Process

It seems to be agreed that there is a combination of over and under-utilization of the EIR process so that it does need both judicial and legislative reform. As previously pointed out, one of the difficulties in the effective use of this particular tool lies in the fact that it is designed to be applied to so many diverse kinds of decisions. In the land use area, most of the applications of the EIR process have been to individual, particular land use decisions. For example, in cities and counties which prepare some 90 of the EIRs in the state, a large majority of the EIRs pertain to such items as tentative tract maps, use permits, variances, grading/site development, specific plan approvals, and planned unit or planned residential development.¹⁴⁵ In each of these decisions, the contemplated use will normally be relatively specific or at least it can be made specific before the discretionary decision is made.

142. See Ass'y LOCAL Gov't COMM. REPORT, *supra* note 5 at 81.

143. See PPRO, *supra* note 5 at II-1 suggesting that if CEQA has cost more than the Legislature had intended "[m]uch of the added costs are attributable to introducing sound management practices to local government, not to processing environmental information."

144. Ass'y LOCAL Gov't COMM. REPORT, *supra* note 5 at 47.

145. *Id.* at 25a, 25b.

The problem with this kind of a decision is that each one may be made in isolation, although the cumulative impact of a succession of similar decisions may be great. Thus, the individual decisions tend not to take into account some of the cumulative impacts.¹⁴⁶ One problem with the EIRs sometimes prepared for individual projects is that they include a large amount of "boiler plating"; that is, general statements which are applicable to any project of this kind or of any project in a particular area. For example, how many times does the reader of EIRs need to be informed that San Diego has an arid, warm climate.

At the other extreme, there are certain kinds of decisions where the decision maker is not precisely aware of the use to be made of the property following the decision. For example, this would include situations in which NEPA has been applied to the exchange of government lands for private lands. An EIS is supposed to be prepared,¹⁴⁷ although it certainly could be argued that the land, once it becomes privately owned, will be subject to regulation by a local government entity whose zoning and other land use regulations will be applied. Only where the precise use is known will it be possible to assess the impact of the use and then only at the level of specificity that the known plans include.¹⁴⁸

The annexation EIR process poses a similar problem. When the proponent of the annexation has a specific land use in mind, particularly where the application describes that use and the government entity has prezoned the area so that it is clear to all concerned what the use will be, the California Supreme Court has said in the important *Bozung* case that the Local Agency Formation Commission, which is responsible for approving such annexations, must prepare an EIR partly because its statutory responsibilities include environmental concerns.¹⁴⁹ On the other hand, it has been found that when a deannexation is proposed and no facts, alleged or otherwise, suggest that detaching certain property from a district would result in any changed land use because in both instances the property is under the land use jurisdiction of the county, no EIR nor even a negative declaration need be prepared.¹⁵⁰ But these cases are relatively simple. For example, if a

146. See PPRO *supra* note 5 at III 38839.

147. See *supra* note 3.

148. For application of CEQA to a lease, see *City of Orange v. Valenti*, 37 Cal. App. 3d 240, 112 Cal. Rptr. 379 (1974).

149. *Bozung v. Local Agency Formation Comm. of Ventura County*, 13 Cal. App. 3d 483, 531 P.2d 778, 119 Cal. Rptr. 315 (1975).

150. *Simi Valley Recreation & Park Dist. v. Local Agency Form. Comm. of Ventura County*, 51 Cal. App. 3d 648, 124 Cal. Rptr. 635 (1975).

group of citizens wishes to incorporate a particular area of a county, it may be motivated by a belief that the existing county regulation provides for too much or for too little development. Surely in such a circumstance the motivation for the annexation would be a change in land use pattern and there would very likely be a change in status quo which would have significant impact upon the environment. But the agency responsible for preparing environmental impact reports would be unable to predict with any substantial degree of accuracy what land use philosophy would prevail once there was an incorporation and an election of as yet unknown land use decision makers who then become subject to new pressures. For this kind of EIR, it is absolutely inevitable that the data be somewhat soft and, thus, a court would have to exercise restraint in evaluating the adequacy of the EIR. At the same time, the EIR can assess with relative accuracy the status quo and ought to be able to make some general assumptions about the alternatives of annexation versus incorporation.

A similar problem arises with rezoning which is not part of a specific change in order to accommodate a particular developer's plans but is rather rezoning as part of, for example, a general rezoning. An EIR is required for a rezoning.¹⁵¹ Such an EIR may have to be prepared on the assumption that, once the land is rezoned, it will be used in a manner which is the most adverse possible use allowable under the zoning. For example, it could happen that minimum lot size would not be used by all of a development in the area but that ultimate density would be half that which might be possible. In order to assess the desirability of zoning, the maximum adverse density ought to be evaluated, and if the more reasonable alternative is to have, for example, one-half of that maximum density, then that alternative ought to be assessed and ought to be the one adopted. Still, one would expect this kind of an EIR to be difficult to amend and necessarily somewhat vague. Yet, the fact of the matter is that once the rezoning occurs, development of the land where subdividing is not required does not leave any discretionary decisions to the local government so that if the EIR does not adequately assess the impacts at the time of rezoning, there will never be an adequate assessment.

151. *Rosenthal v. Bd. of Supervisors of Los Angeles County*, 44 Cal. App. 3d 815, 119 Cal. Rptr. 282 (1975).

A third area which raises a similar problem is that of the general plan. Little use is presently made of the EIR process with respect to general plans.¹⁵² Necessarily, the general plan is likely to project development over a substantial period of time and is likely to be framed in somewhat general terms. One technique for handling the general plan problem would be either to use an EIR with the plan or to actually draft the general plan in the form of an EIR at a more general level,¹⁵³ assessing such impacts as the impact on air quality of the contemplated density in relatively large areas or the impact of the proposed density upon the supplying of services over relatively large areas. It is not possible in the general plan to assess in any precise sense the impacts, let us say, of such things as grading which as far as the general plan is concerned may or may not occur. Some propose the adoption of broad and general EIRs as part of the general planning process and suggest limiting the EIR for more exact and precise decisions, such as the issuance of variances or the approval of a subdivision map, to the immediate and relatively short-term impacts of what is being done.¹⁵⁴ Perhaps this would mean allocating such things as the air quality impacts of indirect sources such as residential uses and shopping centers to the general plan, allocating the evaluation of air quality of direct sources such as power plants also to the precise plan and allocating the assessment responsibilities for such things as grading solely to the EIR in connection with the particular permit. This kind of process would eliminate the need for repetitively "boiler plating" those general considerations. It might also help to alleviate the lack of information that has currently developed about cumulative impact. But concern has been expressed over this approach because it is believed that the EIR prepared for a general plan will be too broad and general and that for the individual permit too narrow and circumscribed so that there is in either event a sole consideration of all of the environmental impacts.¹⁵⁵ This criticism may reflect as much a criticism of the state of art of general planning as it does the application of the EIR process as such to the general plan.

There is now judicial consideration of the application of CEQA to the general plan of the county of Los Angeles in a trial court opinion.¹⁵⁶ The original plan prepared for the County had

152. ASS'Y LOCAL GOV'T COMM. REPORT, *supra* note 5 at 30.

153. The Guidelines allow either technique. See 14 CAL. ADMIN. CODE § 15148 (West 1975).

154. See PPRO, *supra* note 5 at II-9.

155. *Id.* at II-10.

156. *Coalition v. Board of Supervisors*, 8 ERC 1249 (1975).

projected an increased population over twenty years of over 2,000,000. That was later reduced to a projected increase of 700,000. The first plan also provided for a certain amount of area for absorption of the projected growth. In response to the requirement that zoning be consistent with the general plan, a general plan and a related EIR were accepted by the Board of Supervisors. The plan doubled the number of square miles available for expansion despite the attending reduction in the projected population growth. The land available for development was found to be fifteen times more than the plan suggested could be used by 1990.

The trial court found that there were textual statements which were not borne out by the adopted maps. For example, agricultural land would be lost by urbanization if the map were followed although the text of the general plan made statements about the need to preserve such land. Particular mountainous areas which were recognized to be "significant ecological areas" by the text of the plan were nevertheless made subject to extensive urbanization. Based upon these and numerous other faults, the court found the EIR to be totally inadequate. One of the biggest problems was that the court found that the final general plan simply adopted preexisting zoning and responded favorably to the requests of individual property owners for particular treatment of their special property, while failing to respond to objections raised by citizens groups, individual citizens and the county's own staff.¹⁵⁷

Another solution proposed for the problem of inadequate data and extensive costs has been the development of data banks or in-house environmental inventories so that information which is common to multiple projects does not have to be developed each time. Of course, if the data is moved upward to the general plan and reference made thereto, it might not be necessary to do the study each time. If such data banks are to be developed, it has been argued that they are appropriate only in those areas subject to extensive development pressures because the acquisition of ecological data throughout an entire area could be an expansive proposition.¹⁵⁸

157. This raises the interesting question of how much the staff can control decision makers through the EIR. To answer questions raised in staff review, the decision maker has to come up with its own written reasons for rejecting staff recommendation. But staff is usually assigned to the drafting responsibilities.

158. See PPRO, *supra* note 5 at II-5.

X. CONCLUSION

Despite difficulties along the way, the courts, the guidelines and the developing art have been able to resolve many of the operational problems of CEQA. These same sources can continue to improve the process. With time and experience, local jurisdictions can be expected to achieve at least the appearance of compliance with CEQA as interpreted by the guidelines and the courts. Questions such as what kind of activities require use of an EIR, what activities can be satisfactorily dealt with through a negative declaration, what activities do not require an EIR because authorized prior to CEQA's effective date, and what existing environmental data and projected changes in the environment must be included within the EIR can be resolved in time and with experience.

Aided to some extent by the guidelines, the courts are developing a rational decision-making model whereby all significant existing and projected environmental costs must be acknowledged, alternative methods of minimizing these costs must be considered, and a demonstration in writing must be made to show a rational basis for the final decision which is adopted. Despite the lack of a clear legislative mandate to do so, this ultimately was the only direction the courts could go unless they were to give no substantive meaning at all to the strong legislative pronouncements of the policies and purposes of CEQA. No serious argument can be made against this basic goal of rational decision-making and the accompanying demand for public input into that process as well as public disclosure of both the impacts and the justifications.

Observers will continue to doubt the actual effectiveness of such grand scale reform of local government decision-making, whether it be because the costs are too high, the problems too complex or the decision makers too venal. Legislation cannot change this, although law suits can in the individual instance. However, problems which could be worked out within existing legislation, include those areas in which prediction of environmental effects is difficult, such as the adoption of general plans, large rezonings, incorporations and annexations.

The final problem to be solved is that of integrating social and economic impacts, including tax benefits and costs, into the rational decision-making process. Even this may inevitably become a more formal part of the process because of the growing insistence of the California courts and the guidelines that offsetting economic and social advantages, not achievable by less environmentally expensive alternatives, be shown to overcome the environmental

costs. Local governments lack the technical capabilities and the resources to do this in many instances;¹⁵⁹ thus, any steps that can be taken to reduce costs and to make the process more efficient are well justified, but losing sight of the goals of CEQA, as herein interpreted, cannot be justified.

159. *Id.* at III-16.