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Environmental Protection in California: Perspective of the Attorney General Governmental Consideration of the Environment

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Environmental Protection In California: Perspective Of The Attorney General

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Not long ago an editorial cartoon appeared showing Pilgrims landing on the newly discovered American coast to meet a band of Indians. Soon one of the Pilgrims returned to the boat and said, "They want to see an environmental impact report."

Regardless of some assertions to the contrary, it does not appear that requiring such a report would have prevented the settlement of America. It might, however, have prevented some of the serious mistakes that we have since made in handling our environment.

During our first century and a half as a nation, the environment was generally considered to be an exploitable resource, given to the enterprising, industrious, and fortunate for their immediate enrichment. Those who saw other purposes for the public trust were scornfully rejected as posy-pickers. As Justice Musmanno noted, "Without smoke, Pittsburgh would have remained a very pretty *village*."[1]

However, concepts change. We are running out of the limitless resources that fueled our initial development. We no longer have virgin territories to the West. The days when we enjoyed all the pure water, all the clean air, and all the land we needed are gone forever. These changes in our natural surroundings have forced alterations in our perception of how to care for the resources we now know are

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1. Versaille Borough v. McKeesport Coal & Coke Co., *as cited in* 83 PITTS. LEG. J. 379, 385.

altogether too finite. In turn, they have led to a new body of law—preventive environmental law. We have been forced to recognize that it is no longer enough to *diminish* pollution and environmental degradation; we must go further and *prevent* pollution and *preserve* the quality of our environment.

The first and most important step taken thus far in the development of preventive environmental law has been the National Environmental Policy Act[2] and its state progeny, including the California Environmental Quality Act (hereinafter referred to as CEQA).[3] The California Act was a product of the 1970 California Assembly Select Committee on Environmental Quality, appointed by the then Speaker Bob Monagan, and composed of the chairmen of the major Assembly committees dealing with environmental matters. It was closely modeled after the National Environmental Policy Act. CEQA declares the importance of the environment in the process of public decision making. It states that no project significantly affecting the environment should be carried out without the preparation and consideration of an environmental impact report.

As the committee's report stated:

> The impact report . . . will provide the initial steps for applying an orderly process to the consideration of the relationship of man's activities to the environment. Almost every activity has some environmental impact—and despite our advanced technology we do not fully understand the real significance of the many actions we undertake. Our challenge, therefore, is to improve our ability to perceive and prevent those mistakes that may be cumulative and irreversible.[4]

It should have come as no great surprise that CEQA—so closely modeled after its federal counterpart—would be construed as having the same effect: requiring the government to give orderly consideration to the environmental effects of its action. Clearly, the governmental actions relevant to this purpose include the approval of *private* projects which arguably have the potential for more far-reaching environmental effects than publicly initiated projects. This is precisely what the California Supreme Court decided when it first had occasion to consider the applicability of CEQA to the issuance of permits for private activities. In *Friends of Mammoth v. Board of Supervi-*

2. 42 U.S.C. §4321 *et seq.* (1970).
3. CAL. PUB. RES. CODE §21000 *et seq., enacted,* CAL. STATS. 1970, c. 1433, §1, at 2780.
4. ASSEMBLY SELECT COMMITTEE ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL BILL OF RIGHTS 21 (1970).

sors[5] the court held that such environmental considerations should precede the issuance of conditional use and building permits for a development which would, if completed, have included some six buildings with a height of six to eight stories in an area surrounded by the Inyo National Forest and described by the court as "one of the nation's most spectacularly beautiful and comparatively unspoiled treasures."[6] Clearly, such a report would have been required for a similar project within the surrounding national forest under the Federal Act, and it seemed logical for the court to conclude that the same project on private land deserved similar consideration.

The Attorney General's Office had consistently agreed with this construction of CEQA,[7] urged the court to adopt it,[8] and sponsored legislation to clarify its applicability.[9] Assembly Bill 889 was introduced by the author of the original California Environmental Quality Act, Assemblyman John Knox. Mr. Knox was also in agreement with the construction of CEQA imposed by the *Friends of Mammoth* case. However, it soon became apparent that the decision was a surprise to many state and local agencies. Some local attorneys went so far as to advise their agencies to halt construction on projects for which building permits had previously been issued without the benefit of environmental impact reports. Predictions of economic chaos were common.

In response to this increasing furor, the Office of the Attorney General took six actions.

1. Legislative Clarification

At a special hearing of Assemblyman Knox's Committee on Local Government, we asked that Assembly Bill 889 be amended to provide an opportunity for orderly transition to full compliance with CEQA. To that end, we requested the following series of amendments:

(a) Provision for a 120-day moratorium on the effectiveness of the *Friends of Mammoth* interpretation to give government agencies and others affected a chance to prepare for full implementation.

(b) Retroactive validation of permits issued before the *Friends of Mammoth* decision, except in those cases in which judicial proceedings were pending or decisions had already been rendered.

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5. 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972).
6. *Id.* at 253, 502 P.2d at 1052, 104 Cal. Rptr. at 764.
7. Petition, Attorney General of the State of California, *In re* Proposed Guidelines for the Preparation and Evaluation of Environmental Quality Act of 1970, filed before the Public Resources Agency, Sept. 1970, at 9.
8. Brief for Appellant as *Amicus Curiae*, at 15-26, Friends of Mammoth v. Board of Supervisors, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972).
9. A.B. 889, Cal. Stats. 1972, c. 1154, at 2270.

(c) Provision for a reasonable statute of limitations, after which attacks on a project for failure to comply with CEQA would be precluded.

(d) Inclusion of a specific directive in CEQA to ensure that state and local guidelines for the preparation of impact reports include an allowance for adequate public input.

(e) Provision for clear authority in CEQA to designate a lead agency to prepare the environmental impact report, thus avoiding the need for preparation of impact reports by a number of agencies on the same project or on various segments of a single project. We also asked that there be no requirement of subsequent impact reports for successive changes in a major project absent *substantial* changes in the project or the circumstances under which it was to be undertaken.

(f) Clarification of the authority to exclude non-significant projects and to establish appropriate categorical exemptions.[10]

(g) Provisions granting authority to government agencies to pass on the costs of preparing environmental impact reports to the applicant, thus internalizing the environmental costs of the project.

At the same time that these amendments were proposed, this office endorsed the pre-amendment features of Assembly Bill 889 which codified the *Friends of Mammoth* decision and closed a "conservation element" loophole in CEQA that had the potential for widespread avoidance of the environmental impact report process.[11]

2. Statewide Meeting of Public Attorneys

We called a meeting of county counsels and key city attorneys to discuss the *Friends of Mammoth* decision. Out of this meeting came an *ad hoc* steering committee with which we met to refine amendments to Assembly Bill 889.

3. The Need for State Guidelines

Next, we asked the Office of Planning and Research, charged with

10. The California Supreme Court itself observed that there are some types of projects that will never require environmental impact reports because of their insignificant environmental effects. 8 Cal. 3d at 272, 502 P.2d at 1065, 104 Cal. Rptr. at 777.

11. Cal. Pub. Res. Code § 21151, *enacted*, Cal. Stats. 1970, c. 1433, §1, at 2783, allowed legislative bodies of cities and counties to approve projects upon a finding that the project was in accord with the conservation element of their general plans. Cal. Pub. Res. Code § 21151, *as amended*, Cal. Stats. 1972, c. 1154, §11, at 2276, requires *all* local agencies to prepare impact reports on any project which may have a significant effect on the environment.

the responsibility of adopting guidelines for implementation of CEQA, to accelerate its action in this area and provide needed guidance for state and local agencies.

4. An Attorney General's "Check List"

This office prepared a "check list,"[12] setting forth relevant authorities under state and federal law to give interim guidance to local governments pending the adoption of guidelines by the State.

5. Request for Prospective Effect

In order to provide needed clarification, we asked the California Supreme Court to make its decision prospective only. The court declined to take this action.[13] However, the legislature achieved the same result by its subsequent enactment of Assembly Bill 889.[14]

6. The Need for Certainty

Perhaps most important was the need for clarification of the applicable scope of judicial review. Fairness to applicants and the integrity of the governmental process requires that we avoid endless second-guessing of agency decisions. Considerable disagreement had been generated in this regard over the effect of a footnote in the *Friends of Mammoth* decision. Footnote 8 provided in part:

> Subdivisions (c) and (d) [of CEQA] require that mitigation measures and alternatives to the proposed action be considered. Obviously if the adverse consequences to the environment can be mitigated, or if feasible alternatives are available, the proposed activity, such as the issuance of a permit, should not be approved.[15]

Did this language change the historic rules governing the scope of review of governmental agencies? This office did not believe so, but nevertheless urged Assemblyman Knox's committee to clarify its effect. We recommended that the decision of a local agency based upon an adequate environmental impact report be upheld in the absence of an abuse of discretion. CEQA was subsequently amended to reflect this recommendation. Public Resources Code Section

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12. Attorney General's Check List for Implementation of the California Environmental Quality Act, Oct. 1972.

13. 8 Cal. 3d at 272, 502 P.2d at 1065-66, 104 Cal. Rptr. at 777-78.

14. Cal. Pub. Res. Code §21169, *enacted*, Cal. Stats. 1972, c. 1154, §16, at 2278, provides that a project undertaken, carried out, or approved on or before Dec. 5, 1972, is valid notwithstanding a failure to comply with impact report requirements for *private* projects in Cal. Pub. Res. Code §21100, *as amended*, Cal. Stats. 1972, c. 1154, §2.5, at 2274.

15. 8 Cal. 3d at 263, 502 P.2d at 1059, 104 Cal. Rptr. at 771.

21168.5 provides that in any action to review or set aside a determination or decision of a public agency on the grounds of noncompliance with CEQA except for decisions made as a result of a proceeding in which by law a hearing is required, the inquiry shall extend only to whether there was a "prejudicial abuse of discretion."[16]

In commenting on the proposed guidelines promulgated by the Resources Agency to implement CEQA, this office stated,

> Certainly the public entity is to have flexibility in evaluating the [Environmental Impact Report], and its decision should be upheld unless there is a clear abuse of discretion, in light of all the information.[17]

There is no inconsistency between footnote 8 and this position. It would be an abuse of discretion for a local agency to approve a project where, without undue sacrifice of economic or social factors, the adverse consequences to the environment could be mitigated, or where alternatives less damaging to the environment were available without undue sacrifice of economic and social factors. Whether the adverse consequences to the environment could be mitigated or whether alternatives were available without undue sacrifice of economic or social factors would, of course, be primarily a question of fact depending upon all the relevant circumstances.

Thus under CEQA, as amended, and the court's decision, as this office interprets it, environmental, economic, and social factors are to be weighed. Footnote 8 would not require, despite arguments to the contrary, that a permit be denied simply because a project has adverse environmental consequences, irrespective of any consideration of economic and social factors. An agency could still approve a project if the economic or social costs of mitigation measures or alternatives exceed the detrimental impact of the project as originally proposed.

It should be noted that footnote 8 does not deal with the situation where there are adverse environmental consequences which *cannot* be feasibly mitigated and for which there are no feasible alternatives. Thus the question arises, must the project be approved or denied in such a situation? The agency decision should depend on a balancing of the magnitude of adverse environmental impact against the economic and social benefits of the project.

It is clear that governmental decisions are given finality by CEQA.

16. CAL. PUB. RES. CODE §21168.5, *enacted*, CAL. STATS. 1972, c. 1154, §16, at 2278.

17. *Hearings Before the Secretary for Resources, Presentation of the Attorney General of California*, Jan. 30, 1973, at 9.

However, it is just as clear that environmental impact reports are not to be disregarded. Both the California and national Acts properly make environmental protection a key factor in public decision making. Neither the California Legislature nor the Congress intended to require extensive studies which could then be discarded without consideration, thus adding up to just so much "paper pollution."[18]

The story of the California Environmental Quality Act will be a continuing one, as the adopted guidelines themselves become the subject of judicial challenge, and the California courts vigorously attempt implementation of the legislative command. Citizens of all persuasions benefit from CEQA. Clean air, pure water, and a pleasing landscape are not just for the singular enjoyment of the environmental activist. They are no less appreciated by the businessman and the working person. The environmental impact report process gives the ordinary citizen a chance to get the facts, form intelligent conclusions, and make them known. It provides the public servant with a process designed to foster intelligent, informed decisions, and consequently, the responsible businessman is given a solid framework for planning. We all benefit from a process which does not stop development, but instead builds an environmental conscience into governmental decision making.

18. *See* Environmental Defense Fund v. Corps of Eng., U.S. Army, 470 F.2d 289, 298 (8th Cir. 1972); Calvert Cliffs' Coord. Comm. v. United States A.E. Comm'n, 449 F.2d 1109, 1117 (D.C. Cir. 1971).