Legal Adequacy of Environmental Discussions in Environmental Impact Reports

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I.
INTRODUCTION

This article is an introduction into the conceptual analysis that underlies a judicial determination of whether an environmental impact report (EIR) is legally adequate. From a litigation perspective, the question of adequacy usually turns on the issue of the scope of environmental analysis required by a particular project. Inadequacy may thus be defined as the omission of a discussion essential to an informed review of the environmental advisability of a proposed project. This paper refers to these omitted discussions as "conceptual gaps" in the EIR.

As illustrated below, each required topic of discussion in an EIR has evolved into a legal term of art that has a specific function in the environmental review process. To be legally adequate, an EIR must fulfill the purpose of each requirement as developed by regulations and case law. The standard for adequacy routinely cited by the courts—the amorphous "rule of reason"—protects only an EIR that covers the conceptual areas essential to environmental review as defined below.

The method of analysis proposed herein is applicable whether one is preparing or challenging an EIR.

A. Background

In 1970, the California State Legislature passed the California Environmental Quality Act (CEQA)[1] which established adminis-

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1. CAL. PUB. RES. CODE §§ 21000-21176 (West 1977).

trative procedures to "[e]nsure that the long-term protection of the environment shall be the guiding criterion in public decisions."[2] The passage of CEQA was reflective of the same movement that had produced the National Environmental Policy Act of 1969 (NEPA).[3]

With hindsight, the Acts can be seen as the by-products of several popular conceptions of the 1960s: a self-reflective concern with the inward quality of life, a "return to the land movement," and a belief in both the inevitability and the immorality of America's destiny of economic growth.[4] By the end of the 1960s, a growing distrust of secret governmental decision-making, nurtured by the United States' escalated involvement in the Vietnam war, afforded environmentalists a political climate receptive to reform in the governmental decision-making process in a less controversial area than the war effort. The resulting codification of environmental values stands as one of the most enduring legacies of the 1960s' pre-depression morality.

CEQA's practical impact was not fully appreciated until its second year of existence. In 1972, in the landmark case of *Friends of*

2. CAL. PUB. RES. CODE § 21001(d) (West 1977), *amended by* CAL. PUB. RES. CODE § 21001(d) (West Supp. 1983). "It is the intent of the Legislature that all agencies of the state government which regulate activities of private individuals, corporations, and public agencies which are found to affect the quality of the environment, shall regulate such activities so that major consideration is given to preventing environmental damage." CAL. PUB. RES. CODE § 21000(g) (West 1977), *amended by* CAL. PUB. RES. CODE § 21000(g) (West Supp. 1983).

3. 42 U.S.C. § 4321 (1970). Federal cases decided under NEPA are persuasive authority for California courts interpreting similar provisions in CEQA. Environmental Defense Fund v. Coastside County Water Dist., 27 Cal. App. 3d 695, 104 Cal. Rptr. 197 (1972).

4. This mood is reflected in the legislative study from which CEQA emerged: "Economic growth has always been regarded as a major criterion of our economy's performance. Growth implies that our economy is well functioning and providing an ever greater benefit to society. By 1971, our gross national product (GNP), the total market value of all goods and services produced in a year, will be more than one trillion dollars. California's total output is greater than $100 billion, an output surpassed by only six countries in the world. Does this growth in affluence mean we are better off than before? Not necessarily. Economic growth means that the goods and services produced for the market have increased, but it tells us nothing of the composition or quality of this output. More importantly, with respect to the environment, economic growth does not reflect the increase in those products which are not sold, such as smog and pollution. Paradoxically, if smog increases and, thus, the number of anti-smog devices sold increases, growth appears to have occurred. Clearly, we are not better off because of this spurious growth concept." CALIFORNIA ASSEMBLY SELECT COMMITTEE ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL BILL OF RIGHTS 17 (1970).

Mammoth v. Board of Supervisors,[5] the California Supreme Court breathed life into CEQA's grand, but rather abstract, statements of public policy objectives. *Friends of Mammoth* served notice that whenever the requirements of CEQA came before the court, those requirements would be interpreted to afford the environment the fullest possible protection within the reasonable scope of the statutory language.[6]

The political outcry against the *Friends of Mammoth* decision surpassed the initial opposition to the passage of the statute. The Legislature held firm, however, and in 1972 provided for the development and adoption of "Guidelines," regulations to explain and implement the broad policy requirements of the statute.[7] Presumably because then-Governor Ronald Reagan did not want his administration associated with CEQA (and it has not been), the task of developing the Guidelines was shunted off to the Office of Planning and Research which was given exactly sixty days from the effective date of the bill to figure out how CEQA worked, draft enforcing regulations, and "transmit them immediately to the Secretary of the Resources Agency."[8]

Given the pressure-cooker circumstances under which the CEQA Guidelines were originally formulated and the subsequent piecemeal development of a sizable body of case law interpreting the language of CEQA, it is not surprising that the Guidelines and the statute have undergone numerous and regular amendments. In December of 1982, the Resources Agency of California completed the first comprehensive rewrite of the Guidelines.[9] These draft regulations (Draft Guidelines) reflect an impressive effort to make the regulations easier to understand and use.[10] In anticipa-

5. 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972).

6. *Id.* at 257, 502 P.2d at 1056, 104 Cal. Rptr. at 767.

7. CAL. PUB. RES. CODE § 21083 (West 1977).

8. Every state and local government agency was also required to adopt internal guidelines for meeting CEQA's requirements. CAL. PUB. RES. CODE § 21082 (West 1977). This was often accomplished by incorporating the state Guidelines. When preparing or challenging an EIR, it is a good practice to check the sufficiency of and compliance with the local procedures.

9. The rewrite was prompted by the review of regulations required of each agency by A.B. 1111, 1979-1980 Leg., Reg. Sess., 1979 Cal. Stat. 1778, as well as by the favorable reaction to a reformulation of the federal regulations initiated by the Carter Administration, and codified at 40 C.F.R. §§ 1500-1508 (1982).

10. The Resources Agency of California, Proposed Rewrite of the State CEQA Guidelines (n.d.; approved by Agency Dec. 1981) [hereinafter cited as Draft Guidelines]. The Draft Guidelines reorganize the regulations to track the usual sequence of steps in the process used by agencies in analyzing projects. The Resources Agency of

tion of their ultimate adoption, this article cross-references to both the Draft Guidelines and the present Guidelines.

B. When an EIR is Required

CEQA requires every public agency to prepare and consider an EIR before its approval or disapproval of a project that may significantly affect the environment.[11] An EIR is an "informational document"[12] which must contain the analysis and disclosure of environmental consequences provided for by CEQA and the Guidelines to ensure that "major consideration is given to preventing environmental damage."[13] The EIR has been referred to as "an environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return."[14]

CEQA applies not only to public projects but also to all private projects that require governmental approval or that involve governmental participation or financing. A preliminary review process must be conducted before a state or local government agency may approve any discretionary project.[15] If an agency finds no substantial evidence that a project *may* have a significant effect on the environment,[16] a "negative declaration" must be circulated for

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California, Notice, Proposed Amendments to the Regulations of the Resources Agency Dealing with the California Environmental Quality Act 1 (July 9, 1982).

11. CAL. PUB. RES. CODE §§ 21100, 21150 (West 1977).

12. CAL. PUB. RES. CODE § 21061 (West 1977).

13. CAL. PUB. RES. CODE § 21000(g) (West 1977).

14. County of Inyo v. Yorty, 32 Cal. App. 3d 795, 810, 108 Cal. Rptr. 377, 388 (1973).

15. CAL. ADMIN. CODE tit. 14, §§ 15002(a) & (b), 15037 (1982); Draft Guidelines, *supra* note 10, §§ 15002(b), (c), (d). CEQA does not apply to ministerial governmental acts. CAL. PUB. RES. CODE § 21080(b)(1) (West 1977); Day v. City of Glendale, 51 Cal. App. 3d 817, 124 Cal. Rptr. 569 (1975); Draft Guidelines, *supra* note 10, § 15002(i)(1). For a definition of "ministerial," *see* CAL. ADMIN. CODE tit. 14, § 15032 (1980); Draft Guidelines, *supra* note 10, § 15369. Certain categories of projects are exempted from CEQA by statute. *See* CAL. PUB. RES. CODE § 21080(b) (West 1977); CAL. ADMIN. CODE tit. 14, §§ 15100-15203 (1980 & 1982); Draft Guidelines, *supra* note 10, §§ 15260-15329.

16. Draft Guidelines, *supra* note 10, § 15071. Prior to the Draft Guidelines, there was a split in the appellate courts as to whether a negative declaration would be upheld if there were merely substantial evidence in support of the agency's determination that a project had no significant environmental effects. *See* Pacific Water Conditioning Ass'n v. City Council, 73 Cal. App. 3d 546, 140 Cal. Rptr. 812 (1977), *criticized in* Friends of "B" Street v. City of Hayward, 106 Cal. App. 3d 988, 165 Cal. Rptr. 514 (1980). A substantial evidence standard is clearly improper in this stage of the environmental review process and would afford an agency discretion not to comply with CEQA whenever there was conflicting evidence on the initial question of whether a proposed project would have significant environmental effects. The Draft

public review of this negative finding.

When an agency determines that a project may have a significant effect on the environment—either adverse or beneficial[17]—an EIR must be prepared and considered before the project may be approved.[18] The determination of whether a project requires an EIR—and, if it does, the preparation of the EIR—must occur sufficiently in advance of the ultimate governmental decision to permit a meaningful public EIR process before incremental commitments to the project tend to predispose or commit the agency to project approval.[19] Experience shows that there is greater resistance to environmental concerns when environmental analysis is not undertaken until after project planning has crystallized.

Guidelines clarify that a negative declaration is appropriate only when there is not substantial evidence that a project may have a significant impact. This position is in accord with the rationale of Friends of Mammoth v. Board of Supervisors, that "the courts will not countenance abuse of the 'significant effect' qualification as a subterfuge to excuse the making of impact reports. . . ." 8 Cal. 3d 247, 271, 502 P.2d 1049, 1065, 104 Cal. Rptr. 761, 777 (1972). The environmental petitioner, however, has the initial burden of showing evidence to rebut an agency's negative declaration. Perley v. County of Calaveras, 137 Cal. App. 3d 424, 187 Cal. Rptr. 53 (1982).

17. Draft Guidelines, *supra* note 10, §§ 15063-15065. The Draft Guidelines expressly reject a potential semantic loophole suggested by language in the statute, CAL. PUB. RES. CODE § 21068 (West 1977), to the effect that CEQA is concerned with *adverse* significant effects only. The characterization of a significant environmental effect as adverse or beneficial is often in the eye of the beholder and cannot be intelligently determined without a proper and public EIR process. When there is doubt as to whether or not a project may have a significant impact on the environment, the agency must perform an "initial study," an analysis of all phases of the proposed project (e.g., planning, implementation and operation) to determine whether the project may potentially impact on the environment. Draft Guidelines, *supra* note 10, § 15063. This article does not address legal challenges to an agency's negative declaration, *but see supra* notes 16-18.

18. CAL. PUB. RES. CODE § 21061 (West 1977). When an initial study identifies potential significant effects, the project applicant may choose to modify the original project proposal to avoid the environmental impacts. The modified project is then subject to the same standards as the initial project to qualify for a negative declaration. CAL. ADMIN. CODE tit. 14, § 15080(d)(2) (1982); Perley v. County of Calaveras, 137 Cal. App. 3d 424, 187 Cal. Rptr. 53 (1982). However, the proposed mitigation measure must be binding on the project. Draft Guidelines, *supra* note 10, § 15071(b)(2). A non-binding mitigation measure at this stage of the review process is merely an inadequate "project description." *See infra* note 39 and discussion in Section II-A.

19. Bozung v. Local Agency Formation Comm'n, 13 Cal. 3d 263, 282-83, 529 P.2d 1017, 1030-31, 118 Cal. Rptr. 249, 262 (1975); CAL. ADMIN. CODE tit. 14, §§ 15065(c), 15013(b) (1980).

C. CEQA Litigation

A government agency may not exercise its discretionary powers to approve a project until a proper EIR process has been completed.[20] The adequacy of this environmental review process may be challenged by an affected party by petition for writ of mandate.[21] In such an action challenging the approval of a project on the basis of non-compliance with CEQA, the court reviews the environmental record to see if the agency has proceeded in the manner required by CEQA and the Guidelines.[22] If the court finds that the EIR process or the EIR itself is not adequate, it issues a writ of mandate ordering the government agency to rescind its approval of the project pending full compliance with CEQA.[23]

The genius of CEQA's design permits its survival in different political climates: it *mandates* a model of decision-making and environmental review that should lead a rational person to make the environmentally optimal decision on whether or how a project should be developed. But once an adequate EIR has been prepared and made public, CEQA does *not* mandate that the environmentally superior alternative be the adopted action.[24] So long as the potentially adverse environmental impacts and the manner in which they might be avoided are adequately discussed according to a proper EIR process, a government agency retains the ultimate discretion to choose to pay the environmental price for the action because of overriding social or economic concerns.[25]

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20. *See supra* note 15 and accompanying text.

21. CAL. PUB. RES. CODE §§ 21168, 21168.5 (West 1977). A practitioner should be aware of the "unusually short" time limits on bringing and pursuing litigation under CEQA. CAL. PUB. RES. CODE §§ 21167, 21167.3, 21080.5 (West 1977); Draft Guidelines, *supra* note 10, § 15112. A public interest plaintiff that did not participate in, nor receive notice of the agency's administrative proceedings which culminated in the approval of an EIR is not barred from challenging the EIR by the exhaustion of remedies doctrine. Environmental Law Fund, Inc. v. Town of Corte Madera, 49 Cal. App. 3d 105, 113-14 (1975). On the other hand, a plaintiff that had notice of the administrative proceedings and actively participated in the hearing process that considered the EIR may not bring a CEQA action without first exhausting administrative remedies (*i.e.*, appealing the decision to certify the EIR as complete). Sea & Sage Audubon Soc'y, Inc. v. Planning Comm'n, 34 Cal. 3d 412, 418 (1983).

22. CAL. PUB. RES. CODE §§ 21168, 21168.5 (West 1977).

23. The courts may also use their equitable powers to enjoin all work on a project pending full compliance with CEQA. Environmental Defense Fund v. Coast Side County Water Dist., 27 Cal. App. 3d 695, 704, 104 Cal. Rptr. 197, 202 (1972).

24. CEQA's preoccupation with process adds a new dimension to Roscoe Pound's classic theory that "[a] legal system attains its end by recognizing certain interests. . . . It does not create these interests. . . it only recognizes them." R. POUND, THE SPIRIT OF THE COMMON LAW, 91-92 (1921). *See infra* note 25.

25. This is accomplished by deciding that the environmentally superior path is

CEQA thus mandates that the horse be led to the well of environmental wisdom, but whether or not the horse drinks is a political question.[26]

II.
STRATEGIES FOR DEFENDING OR ATTACKING AN EIR ON GROUNDS OF ADEQUACY

In the ten years following *Friends of Mammoth v. Board of Supervisors*,[27] the Guidelines and the case law have developed a well-defined set of rules for the "nuts and bolts" of CEQA procedure. The Draft Guidelines now place these rules in a conveniently ordered sequence to guide the preparer of an EIR through each step of the review process. As a result, future litigation will be less concerned with technical issues that can be decided by a "yes" or "no" or by simple citation to "the answer" in the statute or the Guidelines. On the other hand, the courts have refused to abrogate their own statutory responsibility to implement the policy objectives of CEQA and have refused to defer to the often boiler-plate decisions of governmental agencies that the environmental review was "adequate."[28]

Virtually every EIR that is challenged in court contains an appropriate section for each of the topics CEQA mandates to be dis-

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infeasible. CAL. PUB. RES. CODE §§ 21081, 21002, 21002.1 (West 1977); Draft Guidelines, *supra* note 10, § 15044. Written findings of the specific considerations that make environmentally superior alternatives or mitigation measures (identified in the EIR) infeasible are required. Draft Guidelines, *supra* note 10, §§ 15091(a)(3), 15092. *See* County of Inyo v. Yorty, 71 Cal. App. 3d 185, 203, 139 Cal. Rptr. 396, 408 (1977); Cleary v. County of Stanislaus, 118 Cal. App. 3d 348, 173 Cal. Rptr. 390 (1981). A legal challenge to a finding of overriding economic or social concerns following an adequate review process would have to demonstrate that there was not substantial evidence in the record to support the agency's conclusion. CAL. PUB. RES. CODE §§ 21168, 21168.5 (West 1977); Draft Guidelines, *supra* note 10, § 15091(b)(3); CAL. ADMIN. CODE tit. 14, § 15088(b) (1980).

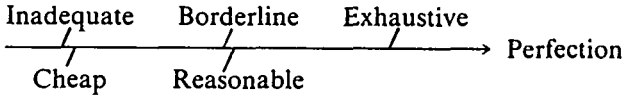
26. Hixon v. County of Los Angeles, 38 Cal. App. 3d 370, 113 Cal. Rptr. 433 (1974) (ultimate decision political); City of Carmel-by-the-Sea v. Board of Supervisors, 71 Cal. App. 3d 84, 94, 139 Cal. Rptr. 214, 220 (1977) ("an EIR does not require a public agency to act in any particular manner, it constitutes evidence which must be considered by the public agency. . . ."); *cf.* Save Lake Washington v. Frank, 641 F.2d 1330, 1337 (9th Cir. 1981) ("The ultimate conclusion. . . may well be a blunder, but we have served our purpose under NEPA by assuring that it was a 'knowledgeable blunder' ").

27. 8 Cal. 3d 427, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972).

28. The Court "must be satisfied that the [agency] has fully complied with the procedural requirements of CEQA because only in this way 'can a subversion of the important public purposes of CEQA be avoided.' " Santiago County Water Dist. v. County of Orange, 118 Cal. App. 3d 818, 823, 173 Cal. Rptr. 602 (1981).

cussed in an EIR. As a general rule, the table of contents tracks the requirements listed in the Guidelines.[29] Yet inevitably, courts will find some of these EIRs inadequate. The standard for adequacy routinely articulated by the courts and now codified in the Guidelines—the so-called "rule of reason"—has little predictive value in litigation: "An evaluation of the environmental effects of a proposed project need not be exhaustive, but the sufficiency of an EIR is to be reviewed in the light of what is reasonably feasible. . . . The courts have looked not for perfection but for adequacy, completeness, and a good faith effort at full disclosure."[30]

The popular conception of adequacy suggested by the rule of reason can be diagrammed as follows:



Under this linear analysis, the answer to the question "When is a discussion of a topic adequate?" is answered semantically—"When the discussion is 'reasonable.' " The practical result of this nebulous standard has been some notoriously thick EIRs.[31] However, weight of paper and detail of discussion are not the legal standards of adequacy and offer no guarantee of success in court.

An examination of what the courts are doing with EIRs (as opposed to what the courts say they are doing) reveals that EIRs which are deemed legally inadequate suffer from basic conceptual omissions in the environmental review. The judicial analysis of whether an EIR is sufficient is suggested by the following diagram.

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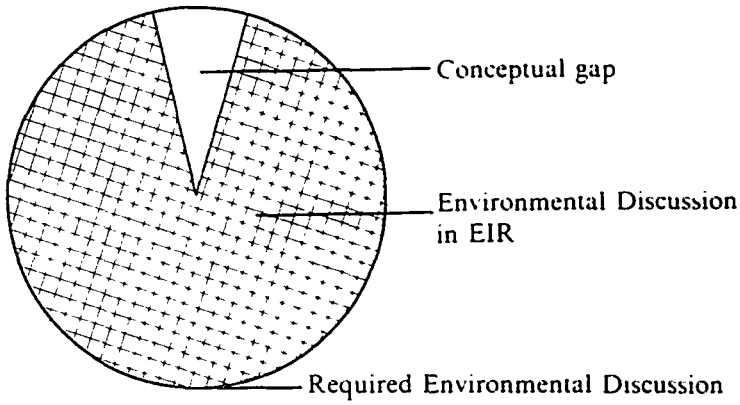
29. While a table of contents or an index is required, Draft Guidelines, *supra* note 10, § 15122, the format may be varied so long as the document states where each required topic appears, Draft Guidelines, *supra* note 10, § 15121.

30. CAL. ADMIN. CODE tit. 14, § 15150 (1980); Draft Guidelines, *supra* note 10, § 15152.

31. *See* Draft Guidelines, *supra* note 10, § 15152, discussion: "The concern over vulnerability to legal challenges to the adequacy of EIRs led to the expansion of EIRs to unmanageable sizes. The document became unnecessarily expensive, and public review of the documents became difficult."



In the above diagram, the complete circle represents the environmental discussion required to be in a particular EIR. The shaded portion represents the actual discussion in that EIR. The unshaded portion—labeled "conceptual gap"—represents a possible discussion that was not contained in the EIR.

In the posited situation, the analysis of legal adequacy from a litigation perspective may be stated simply: the environmental plaintiff will prevail if he can convince the court that CEQA requires that the information represented in the diagram as the "conceptual gap" be included in the EIR. In other words, the plaintiff must persuade the judge that something critical to an informed evaluation of the project's environmental consequences is missing from the EIR.

On the other hand, the environmental plaintiff would be ill advised to directly challenge any part of the EIR within the shaded area unless the lack of detail is obvious.[32] A challenge to the adequacy of a discussion that does appear in the EIR in some depth is likely to elicit one of the many judicial pronouncements to the effect that an EIR need not be perfect but only demonstrate a good-faith effort at adequate disclosure.[33]

The linear approach of defining adequacy by increasing detail

32. *See, e.g.*, Santiago County Water Dist. v. County of Orange, 118 Cal. App. 3d 818, 173 Cal. Rptr. 602 (1981) (bare conclusory statements lack sufficient detail). For another example of lack of detail, *see infra* note 55.

33. *E.g.*, San Francisco Ecology Center v. City & County of San Francisco, 48 Cal. App. 3d 584, 122 Cal. Rptr. 100 (1975) (mere disagreements among experts do not invalidate an EIR).

in an EIR offers little guidance on the critical function of conceptually mapping out the scope of environmental review required by a particular project. If there is a conceptual gap in the environmental review contained in an EIR, it cannot be cured by increasing the detail of other parts of the EIR—even if the other parts achieve near perfection on the quantitative scale of adequacy and the completed EIR must be hauled to court in a truck. The real issue in CEQA litigation is what is *not* in the EIR. As the jazz musicians say, it's the space between the notes that makes the music.

The remainder of this article is an introduction into conceptual analysis of legal sufficiency in environmental reporting. While the article deals primarily with CEQA, the basic tenets of the thesis are equally applicable to NEPA. The following sections separately analyze the legal scope of discussion for several elements of an adequate EIR: the project description, and discussions of cumulative impacts, alternatives, and mitigation measures. The same principles of analysis may be applied to other topics in EIRs.

A. Project Description

Although CEQA contains no express requirement for a project description, the courts recognized the practical necessity of "an accurate, stable and finite project description" to a legally sufficient EIR.[34] The Guidelines codify the requirement.[35]

The Guidelines define the term "project" to mean "the whole of an action, which has a potential for resulting in a physical change in the environment, directly or ultimately. . . ."[36] It follows that an adequate project description must reveal the environmental impact from the full potential of the project.

The project description stakes out the scope of environmental review to be contained in the EIR. Consequently, an artificially narrow project description taints all of the environmental analyses which follow. The following example illustrates the need for a

34. County of Inyo v. City of Los Angeles, 71 Cal. App. 3d 185, 139 Cal. Rptr. 396 (1977).

35. CAL. ADMIN. CODE tit. 14, § 15141 (1982); Draft Guidelines, *supra* note 10, § 15124. However, neither the present regulations nor the Draft Guidelines do a good job of defining the requirement; the definition of "project" integral to an understanding of the necessary scope of a "project description" appears elsewhere in the Guidelines at § 15378.

36. CAL. ADMIN. CODE tit. 14, § 15037(a) (1982); Draft Guidelines, *supra* note 10, § 15378.

finite description of the whole of any action which has a potential environmental impact.

Project Proposal: Factory to build a community of wheelies.[37]

What is the project description? Before you answer, consider the following information:

a. The project is planned to produce twenty-five wheelies per month.

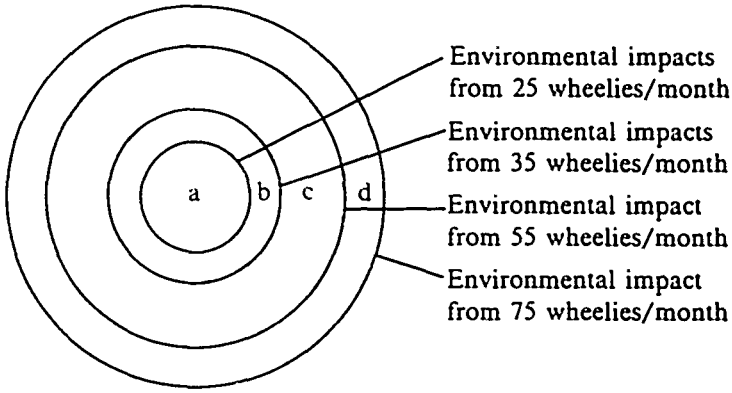
b. The plant is designed to have an ultimate optimum output of thirty-five wheelies per month.

c. Many wheelie plants of this size currently in operation produce fifty-five wheelies per month.

d. In a pinch, the plant could produce seventy-five wheelies per month.

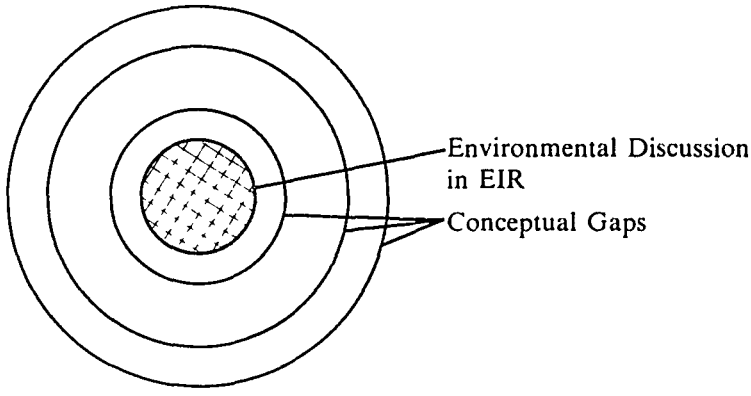
e. The market for wheelies is insatiable.

The effect of each possible project description on environmental review may be diagrammed as follows:



A description of the project limited to the present plan to produce twenty-five wheelies a month would artificially curtail environmental review in the EIR to that specific prospect. In the following diagram, the grid area in the center of the circle represents the scope of environmental impact analysis produced by the twenty-five wheelie project description.

37. "Wheelies" are noisy little machines that burn gas and pollute.



Actually, under the hypothetical condition, the proposal to build the wheelie plant holds the likely potential for environmental impacts from a plant producing seventy-five wheelies a month. An adequate project description must disclose this full capability of the proposed plant to affect the environment.

If the law were otherwise, it would be possible to plan a huge project, simultaneously adopt a proposal calling for a low level of operation, and proceed to approve the project on the basis of an EIR that merely evaluated the environmental impacts from the project operating at the proposed low level.[38] Even if a new EIR were required before the wheelie plant could increase its level of operation, this sequence would result in a project being completely funded and constructed before its true potential environmental effects were disclosed and considered. Any post-construction evaluation of the environmental effects from increased operations would include economic advantages for increased operation that were not present when the project was initially evaluated. This is contrary to CEQA's purpose, which is to require environmental disclosure *before* commitment to a project.[39] The example illustrates why the law requires a stable project description of the *whole* action that has a *potential* for

38. The present plan for utilizing the plant to produce 25 wheelies per month is actually a non-binding mitigation measure. *See infra* Section II-D and *supra* note 18. Note that according to the illustrations, the EIR would have disclosed a surprising increase in the environmental impacts of 35 to 55 wheelies per month. If the EIR properly disclosed this potential impact, the reviewing agency could consider binding mitigation measures to prevent this occurrence.

39. Bozung v. Local Agency Formation Comm'n, 13 Cal. 3d 263, 282-83, 529 P.2d 1017, 1029-31, 118 Cal. Rptr. 249, 261-63 (1975).

environmental consequences.[40]

Another type of project that is often underdescribed is illustrated by the following example:

Project Proposal: Increase in water supply system by thirty percent.

What is the project description? Before you answer, consider the following information. After the implementation of the project, an additional seventy percent increase in water supply would be obtainable for merely one-quarter of the cost of the initial project.

This additional fact lends itself to the inference that part of the cost of the initial project is setting the stage for a subsequent project which will be very economically attractive. The fact that approval of the initial project may not represent a legally binding commitment to embark upon the second phase is irrelevant: the financial commitment and the economic relationship between the two phases constitute a practical commitment to proceed.

Faced with these facts, a court of appeal in California held that "[f]ragmentation of a project which is intended to be completed as a whole may be permissible, but the EIR must then cover the integrated plan."[41] The initial project description must thus embrace both the immediate project and the probable subsequent project.[42] The environmental analysis can then disclose the impacts if the subsequent project were to be constructed *before* a practical commitment has been made to the future construction.[43]

In practice, the question of whether a proposed project is or is not the first phase of a larger project is often a factual issue, hence vulnerable to litigation. The project proposer cannot simply as-

40. *See* County of Inyo v. City of Los Angeles, 71 Cal. App. 3d 185, 139 Cal. Rptr. 396 (1977). The case concerned the construction of a pipe to bring water from the Inyo Valley to Los Angeles. The Court rejected the City's project description (its present plan to import an amount of water much less than the capacity of the pipe) as being artificially narrow.

41. Environmental Defense Fund v. Coastside County Water Dist., 27 Cal. App. 3d 695, 706, 104 Cal. Rptr. 197, 203 (1972).

42. "[W]here an individual project is a necessary precedent for action on a larger project, or commits the lead agency to a larger project, with significant environmental effect, an EIR must address itself to the scope of the larger project." Draft Guidelines, *supra* note 10, § 15165.

43. The degree of specificity in the environmental analysis of the subsequent project may be less detailed. Big Rock Mesas Property Owners Ass'n v. Board of Supervisors, 73 Cal. App. 3d 218, 139 Cal. Rptr. 445 (1977); *see* Draft Guidelines, *supra* note 10, §§ 15145, 15147, 15152.

sume the answer in close cases.[44] Therefore, in a borderline situation, a prudently drawn EIR discloses and discusses the *issue* of the extent to which the proposed project represents a practical or potential commitment for future expansion, and the environmental consequences of the ultimate potential project. The following questions illustrate the appropriate analysis: What is the degree of interdependence between the two projects? Is the first project economically feasible by itself? What practical commitment to approval of the second project does the first represent? If the project is approved, are the additions more likely? Does the proposed project provide a base for the later addition? Does the proposed project create the possibility of later additions? When, after a rigorous analysis, it is concluded that certain impacts are too speculative for evaluation, this analysis and conclusion should be reported in the EIR.[45]

Writing an EIR is not unlike writing a law school examination: if you spot the issues and discuss them reasonably your ultimate answer will not affect your grade. An EIR that covers the conceptual issues of the project description requirement will smoothly sail through the courts, protected by the rule of reason whether or not the reviewing court would have reached the same ultimate conclusion.[46] On the other hand, an EIR with conceptual gaps will find little protection in defense counsel's appeal to the rule of reason.

B. Cumulative Impacts

The required discussion of cumulative impacts is one of the least-understood requirements and often the first to feel budgetary constraints in an EIR. As a consequence, many EIRs fail to adequately discuss these secondary impacts of a project and are vul-

44. Compare Whitman v. Board of Supervisors, 88 Cal. App. 3d 397, 410 n.6, 151 Cal. Rptr. 866, 873 n.6 (1979) (EIR for exploratory well must consider environmental consequences if well successful) with Lake County Energy Council v. County of Lake, 70 Cal. App. 3d 851, 139 Cal. Rptr. 176 (1977) (EIR on exploratory geothermal well need not consider the speculative question of commercial production if the well is successful); *see also* Brentwood Ass'n for No Drilling v. City of Los Angeles, 134 Cal. App. 3d 491, 184 Cal. Rptr. 664 (1982) (project description properly limited to exploratory drilling when expanded project description would lead to meaningless generalities).

45. CAL. ADMIN. CODE tit. 14, § 15140(h) (1982).

46. *E.g.*, Save Lake Washington v. Frank, 641 F.2d 1330, 1337 (9th Cir. 1981) ("We reiterate our very limited role in the process of [review]. The ultimate conclusion . . . may well be a blunder, but we have served our purpose under NEPA by assuring that it was a 'knowledgeable blunder.' ").

nerable to a successful attack on this ground. "Cumulative impacts refer to two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts."[47]

There are three basic types of cumulative impacts for purposes of CEQA. The first occurs when two or more individual effects of the project itself combine to compound the adverse environmental impacts. For example, assume a project spurs growth in an area and that growth in turn increases the surface vehicle traffic beyond the capacity of the existing road system. The impact on air quality would ordinarily be calculated as a factor of the increased number of vehicles. However, in the posited situation, the cumulative impact on air quality would be substantially greater than the usual calculation based on vehicle number would indicate. Because the traffic system is overutilized, as the speed of the traffic approaches zero miles per hour, each car begins to resemble a permanent source of air pollutants. The cumulative effect on air pollution is thus greater than the simple sum of individual parts of the project would reveal.

The second type of cumulative impact is the result of the interplay between the project and other things going on in the world that might substantially affect how the project will be used. For example, assume a proposal to construct a nice little airport in a community which already anticipates a population explosion. The EIR for the proposal should discuss the cumulative effects of increased population on the probable level of use of the airport and the effect of the airport on the development of the community.

As another example of the second type of cumulative impact, consider a proposal to build a strip of freeway that does not connect to the existing freeway system. Assume that the EIR proceeds to analyze the environmental impacts from the strip of highway in isolation from the existing freeway system. In this situation, one could argue persuasively that the posited EIR is inadequate because it fails to discuss cumulative effects of the probable future connection with the freeway system and subsequent increased use of the region.[48]

The third type of cumulative impact analysis requires consideration of the overall effect of many projects with similar environ-

47. CAL. ADMIN. CODE tit. 14, § 15023.5 (1980).

48. This may also indicate a defective project description.

mental impacts.[49] For example, picture a situation where the U.S. Forest Service permits several small, independent lumbering operations. Drafts of the EIRs for each individual project reasonably conclude that the environmental impact will be insignificant. However, the cumulative impact of all the small logging operations when considered together creates a strikingly different picture and must be disclosed in the EIR.[50]

An analysis of cumulative impacts cannot be made in isolation from regional developments. An EIR must disclose other projects, both existent and planned, that will also be impacting on the project area.[51] An EIR for a housing development must consider other similar developments in the vicinity;[52] an EIR for an oil-drilling operation must consider other existing or planned drilling in the area.[53] The discussion is not limited to identical projects but should cover all reasonably foreseeable projects that will have a similar cumulative impact on the area.[54]

Inadequate or non-state-of-the-art cumulative-impact analysis in the air pollution and traffic analysis areas may also provide the grounds for a successful attack on an EIR. Frequently, an EIR evaluating a proposed project will conclude that there will be "some impact" on traffic and air pollution, but that given the already existing air pollution and traffic congestion, the impact will be negligible.[55] Thus, developers of thousands of new projects may independently determine that their own impacts on traffic and air quality in the area are negligible. No doubt an independent builder would think it grossly unfair if his company were singled out to solve society's traffic and air quality problems.

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49. CAL. ADMIN. CODE tit. 14, § 15023.5(b) (1980); Draft Guidelines, *supra* note 10, § 15131. The Draft Guidelines appear to reserve the term "cumulative impacts" for consideration of related projects in the area. Cumulative impacts from parts of the project would be considered indirect environmental effects under Draft Guidelines § 15126(a).

50. *See* Minnesota Pub. Interest Research Group v. Butz, 541 F.2d 1292, 1306-07 (8th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977); Kleppe v. Sierra Club, 427 U.S. 390 (1976).

51. CAL. ADMIN. CODE tit. 14, §§ 15023.5(c)(1), 15142(a) (1980 & 1982); Bozung v. Local Agency Formation Comm'n, 13 Cal. 3d 263, 283, 529 P.2d 1017, 1030, 118 Cal. Rptr. 249, 262 (1975).

52. People v. County of Kern, 39 Cal. App. 3d 830, 842 n.8, 115 Cal. Rptr. 67, 75 n.8 (1974).

53. Whitman v. Board of Supervisors, 88 Cal. App. 3d 397, 409-11, 151 Cal. Rptr. 866, 872-74 (1979).

54. CAL. ADMIN. CODE tit. 14, § 15023.5(c)(1) (1980).

55. *E.g.*, Whitman v. Board of Supervisors, 88 Cal. App. 3d 397, 406, 151 Cal. Rptr. 866, 870 (1979).

However, the purpose of the cumulative-impact requirement is to prevent the type of runaway environmental inflation caused by the incremental increases of two or more smaller projects.[56] CEQA does not prohibit a governmental agency from approving a whole series of projects despite the cumulative impacts on the environment. But CEQA does require that the environmental consequences of cumulative impacts be publicly confronted before the government agency is led down the primrose path of development.

To sum up the discussion of cumulative impacts, this is an area of analysis where EIRs often fall down. Frequently a project will have excellent plans and environmental analyses for *on-site* development and yet dismiss *off-site* cumulative impacts with bland generalities.

It is not hard to imagine why EIRs so often fail in this area. While the discussions of project description and alternatives flow directly from the developer's conceptualization of the project, the discussion of cumulative impacts requires a region-wide perspective and concern with overall regional development and planning. When someone's personal ego, bankroll, political ambitions, or salary is directly or indirectly dependent upon selling a project, a dispassionate, region-wide planning perspective is easily forgotten. However, given the correct mental bent, discussing cumulative impacts competently is not a burdensome task. Once again, so long as the conceptual territory is covered, the discussion need not be as detailed as that of the effects attributable to the project alone.[57]

C. Alternatives

One of the primary purposes of the EIR process is to identify alternatives to the proposed project that would achieve the project objectives with less adverse environmental impact. Obviously, if such alternatives exist, there should be a good reason for rejecting them in favor of the proposed project.[58] The EIR must identify and discuss a realistic range of alternatives to the project to pro-

56. CAL. ADMIN. CODE tit. 14, § 15023.5 (1980).

57. Draft Guidelines, *supra* note 10, § 15131(b); Big Rock Mesas Property Owners Ass'n v. Board of Supervisors, 73 Cal. App. 3d 218, 139 Cal. Rptr. 445 (1977). When, after a rigorous analysis, it is concluded that certain impacts are too speculative for evaluation, this analysis and conclusion should be noted in the EIR. CAL. ADMIN. CODE tit. 14, § 15140(h) (1982).

58. CAL. ADMIN. CODE tit. 14, § 15143(d) (1980); Draft Guidelines, *supra* note 10, § 15126(d).

vide a basis for rigorous public review of whether the project justifies its environmental impact.[59]

The alternatives discussion is the core requirement of CEQA. The ultimate policy question that an EIR informs upon is whether to approve the proposed project, approve an alternative to the project, or do nothing. The information on which this question will be debated and determined is drawn largely from the EIR's discussion of alternatives. That discussion must include all reasonable alternatives to the project and "focus on alternatives capable of eliminating any significant adverse environmental effects or reducing them to a level of insignificance, even if these alternatives substantially impede attainment of the project objectives, and are more costly."[60]

Every EIR that is challenged on the adequacy of its consideration of alternatives will be defended in court by some statement of the "rule of reason" to the effect that the EIR need not consider every possible alternative. However, the "rule of reason" does not excuse an inadequate discussion of alternatives; it excuses only the identification of those alternatives *not* necessary to permit a reasoned choice.[61] There is no excuse for an EIR not presenting the range of alternatives essential to informed decision-making.

As a general rule, the cases in which a court finds that an EIR inadequately considered alternatives reflect serious conceptual breakdowns in the preparation of the EIR. For example, consider the following situation. An existing two-lane road through a national park is clearly incapable of meeting projected traffic needs.

Project Proposal: Construction of a new four-lane highway through a national park.

The primary question (whether one is preparing or attacking the EIR) is: what is the reasonable range of alternatives to the project? In other words, what other ways are there to handle the problem? Casual reflection may produce the following approaches:

a. Limit traffic through the park.
b. Improve the road.
c. Provide alternative roads.
d. Provide alternative transportation.

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59. California v. Block, 690 F.2d 753, 765-69 (9th Cir. 1982).
60. CAL. ADMIN. CODE tit. 14, § 15143(d) (1980).
61. *Cf.* Save Lake Washington v. Frank, 641 F.2d 1330, 1334 (9th Cir. 1981); California v. Block, 690 F.2d 753, 767 (9th Cir. 1982).

e. Do nothing.

But, in the above situation, an EIR that discusses alternative locations for the proposed new road without discussing the alternative of widening the existing two-lane road is clearly inadequate.[62]

Many EIRs fail to present a reasonable range of meaningful alternatives. Like the example discussed above, these inadequate EIRs often appear to have been prepared on the assumption that something similar to the proposed project will be constructed, and not from the true starting point of environmental review—the existing environment.[63]

D. Mitigation Measures

An EIR must describe mitigation measures which could minimize the project's identified adverse environmental effects.[64] This requirement calls for an environmental efficiency analysis of the project—from planning through implementation and operation.

Mitigation measures range from physical changes in the project to operating plans for minimizing the identified environmental impacts.[65] Possible mitigation measures that were rejected by the project proponents must also be identified.[66]

The mitigation-discussion requirement also functions as a requirement for operational environmental planning. This facet of environmental analysis is illustrated by the federal case of *Minnesota Public Interest Research Group v. Butz*,[67] decided under an analogous provision of NEPA. The *Butz* case concerned a proposal for logging operations in public parks. The challenged environmental impact statement (EIS)[68] adequately discussed the environmental pros and cons of permitting such logging. The Forest Service approved the EIS and made a policy decision that

62. This example is based on Coalition for Canyon Preservation v. Bowers, 632 F.2d 774 (9th Cir. 1980). For a similar result, *see* California v. Block, 690 F.2d 753, 765-69 (9th Cir. 1982).

63. CAL. ADMIN. CODE tit. 14, § 15142 (1982); Draft Guidelines, *supra* note 10, § 15125. Environmental Planning & Information Council v. County of El Dorado, 131 Cal. App. 3d 350, 182 Cal. Rptr. 317 (1982) (EIR on amendments to general plan must compare environmental impacts of proposed amendments to the existing environment, not to the existing general plan).

64. CAL. ADMIN. CODE tit. 14, § 15143(c) (1980); Draft Guidelines, *supra* note 10, § 15126(c).

65. *See infra* text accompanying note 68.

66. CAL. ADMIN. CODE tit. 14, § 15143(c) (1980); Draft Guidelines, *supra* note 10, § 15126(c).

67. 541 F.2d 1292 (8th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977).

68. An EIS is the federal equivalent under NEPA to an EIR.

the benefits of logging outweighed the environmental consequences.

The court found the EIS inadequate and annulled the agency's approval of the project because the discussion of mitigation measures was incomplete. The EIS had not contained any criterion, beyond that relating to sales, for determining what sites were to be logged, when the logging would take place, or what types of trees would be cut down. Absent such environmental guidelines for the operation of the project, the discussion of mitigation measures was inadequate.[69]

The analysis of mitigation measures is closely interrelated with the discussion of alternatives. The alternatives discussion often becomes an "either-or" comparison between the proposed project and another course of action. However, the mitigation discussion requires an interdisciplinary analysis of the project as part of its surrounding environment. Therefore (although the Guidelines do not expressly require it), logic dictates that an environmentally superior alternative that was rejected as an alternative because it could not achieve the project objectives by itself, must, when appropriate, be considered in coordination with the proposed project as a possible mitigation measure. For example, if public transportation were rejected as a feasible alternative to a proposed freeway, the EIR should consider how public transportation could be interfaced with the proposed freeway as a mitigation measure.

Once mitigation measures are proposed, EIR drafters commonly omit discussion of additional potential environmental impacts from the proposed mitigation measures.[70] The new Draft Guidelines expressly require such discussions.[71] In this author's opinion, the root problem with inadequate discussions lies in the failure to integrate the effect of a proposed mitigation measure into a dynamic analysis of the environment surrounding the project. Too often, the EIR merely analyzes the proposed mitigation measure from the viewpoint of the project and not from the proper perspective of the surrounding environment.

For example, if a proposed project is expected to increase traffic

69. Minnesota Pub. Interest Research Group v. Butz, 541 F.2d 1292, 1306 (8th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977).

70. *E.g.*, Stevens v. City of Glendale, 125 Cal. App. 3d 986, 178 Cal. Rptr. 367 (1981); *cf.* Santiago County Water Dist. v. County of Orange, 118 Cal. App. 3d 818, 173 Cal. Rptr. 602 (1981) (construction of additional water delivery facilities may have a significant environmental effect that must be discussed in the EIR).

71. Draft Guidelines, *supra* note 10, § 15126(c).

in an area and one of the proposed mitigation measures is to widen the street in front of the project, the true effects of the proposed mitigation measure must be evaluated in the context of an analysis of the surrounding traffic system. Without an analysis of how the proposed mitigation measure will impact on the surrounding system, the EIR does not provide an adequate informational base for the decision-maker to determine whether the proposed street widening would attract traffic, merely shift a traffic bottleneck, or actually mitigate traffic impacts on the surrounding traffic system. An EIR that fails to integrate an analysis of the *actual* effects of a proposed mitigation measure on the impact area does not fulfill the CEQA requirement to discuss potential adverse impacts from the whole project.

A well-prepared discussion of mitigation measures grapples with every identified environmental effect and publicly ensures that serious consideration has been given to minimizing environmental impacts.[72]

III.
CONCLUSION

Environmental litigation is the last act in a struggle for power over a controversial governmental decision. It is the means by which the political outs protest that victory was unfairly won by the political ins. For the successful environmental plaintiff, the only prize is delay of the project he opposes. But in a society where time is money, delay may be fatal. Environmental litigation is a war of attrition.

When an EIR is challenged, the question before the court is whether the environmental discussion is legally adequate. At this point, the procedural requirements become substantive. As illustrated above, each required topic of discussion in an EIR has evolved into a legal term of art that has a specific function in the environmental review process. The guidance of the "rule of reason" is illuminated only in the context of this statutory purpose. To be legally adequate, an EIR must fulfill the purpose of each requirement as developed by the Guidelines and the case law. In

72. CAL. ADMIN. CODE tit. 14, §§ 15088(a)(1), 15143(c) (1980); Draft Guidelines, *supra* note 10, § 15126(c) ("This discussion shall identify mitigation measures for each significant environmental effect identified in the EIR."). The discussion of mitigation measures is not limited to dealing with avoidable significant effects as several minor mitigation measures together could possibly make a substantial reduction in a significant effect. Draft Guidelines, *supra* note 10, § 15126 discussion.

short, the much cited "rule of reason" protects only an EIR that covers the conceptual areas essential to environmental review as defined above.