ENVIRONMENTAL IMPACT STATEMENTS

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ABSTRACT: The National Environmental Policy Act of 1969 (NEPA) became law January 1, 1970, while the California Environmental Quality Act was adopted on September 18 of the same year. NEPA established specific action-forcing procedures for implementing the policy; created the Council on Environmental Quality (CEQA); fostered development of indices of environmental quality; and provided for an annual CEQA report of progress. Section 102(2)(C) is the most renowned portion of NEPA. It requires the preparation of detailed written statements of environmental impacts, including alternative actions and their impacts. Section 102(2)(A) requires federal agencies to implement the integrated use of natural and social sciences and environmental design arts in reviewing environmental problems.

The California Environmental Quality Act of 1970 was amended substantially in 1972 as a result of the Friends of Mammoth Decision by the State Supreme Court. CEQA requires that guidelines for the preparation of environmental impact reports shall be adopted by the State Resources Agency and followed by all state and local government entities regulating activities of private individuals, corporations, and public agencies which are found to affect the quality of the environment. CEQA defines environment as the physical conditions within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance.

INTRODUCTION

The National Environmental Policy Act (NEPA) was adopted by the United States Congress in 1969 and signed by the President on January 1, 1970, in response to a growing demand for action designed to afford a greater measure of protection to the environment. The Act requires all government agencies to take into account the environmental effect of their actions, and to consciously review their informational and decision-making processes prior to undertaking a specific project. The Act also established the Council on Environmental Quality composed of three members appointed by the President who would be responsible for reporting to the President, and through him to the Congress on five specified topics. These topics are the status and condition of the major environmental classes of the nation, such as air, water, estuaries, fresh water, forests, drylands, wetlands, range, urban, suburban, and rural environment. The Council would also forecast trends in quality of the environment, adequacy of available natural resources in view of expected population pressures, review programs and activities of all levels of government including the state and local and individuals for their effect on the environment, and developing programs for remedying deficiencies of existing programs and activities.

The National Environmental Policy Act is not the long piece of legislation one might expect in view of its profound effect on the conduct of government and the private sector. In fact, there are only eleven sections in the entire Act. However, the most famous of these (Section 102) prescribes specific "action-forcing" procedures which set the pattern for federal agency action.

The influence exerted by the language and thrust of the federal NEPA on the California Environmental Quality Act is obvious from a comparison of the two acts. Not only does familiarity with the NEPA assist in the interpretation and understanding of the CEQA, but insight into the probable outcome of legal challenges to activities within the state can be forecast on the basis of federal court decisions affecting federal environmental impact statements.

Although the federal and state acts are similar in character and content, they are not identical. For this reason, it is essential that those individuals engaged in environmentally sensitive programs be thoroughly familiar with both the federal and the state environmental acts. However, in doing so, they should be certain as to which of the acts govern. For most of the activities carried on in California, the California Environmental Quality Act is the primary law for those activities undertaken by state agencies, county, city governments, or individuals. In adopting the California Environmental Quality Act, the Legislature declared its intent 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. The original interpretation of the CEQA was that environmental impact reports were required for only those government activities involving a construction project. However, this interpretation was challenged by a group of private citizens in a case which has since become famous as the "Friends of Mammoth versus Mono County." The essence of the decision handed down by the State Supreme Court in that case was that not only were the projects undertaken by government agencies subject to the requirement that environmental impact reports be prepared, but those activities in the private sector as well came under the jurisdiction of this law. Not only did the court hold that private projects were subject to the law, but a project might include other activities in addition to construction-type projects. The effect of this decision was traumatic because it appeared to place every activity, project, and development program in the state operating under a permit issued by a local authority in jeopardy. Many millions of dollars worth of construction projects were paralyzed because many local authorities were uncertain as to how to proceed. Some counties issued permits embossed with what amounted to a disclaimer of responsibility in the event the project for which the permit was issued should be challenged in court. In other counties no permits at all were issued. Although these conditions did not continue for an extended time, they are indicative of the uncertainties surrounding the interpretation of existing law and the unwillingness of government officials to be drawn into this area of conflict.

Accusations and recriminations added to the confusion and misunderstanding by all parties. It was in such an atmosphere then that Assemblyman Knox introduced AB 889 late in 1972. This Act adopted by the Governor on December 4, 1972, amended the California Environmental Quality Act by making it more specific and explicit in its language and terms. It defined environment as the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance. It defines environmental impact report as a detailed statement including seven topics: (a) the environmental impact of the proposed action; (b) any adverse environmental effects which cannot be avoided if the proposal is implemented; (c) mitigation measures proposed to minimize the impact; (d) alternatives to the proposed action; (e) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; (f) any irreversible environmental changes which would be involved in the proposed action shouldn't be implemented; (g) the growth inducing impact of the proposed action.

CEQA provided definitions which were essential to the implementation of the Act. It defined "project" as: (a) activities directly undertaken by any public agency; (b) activities undertaken by a person which are supported in whole or in part through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies; (c) activities involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies. It defined "person" as any person, firm, association, organization, partnership, business, trust, corporation, company, district, county, city and county, city, town, estate, and any of the agencies and political subdivisions of such entities.

The Act specified that it should only apply to discretionary projects proposed to be carried out or approved by public agencies and should not apply to administerial projects carried out or approved by them. The CEQA required the Secretary of the Resources Agency to adopt guidelines specifically including criteria for public agencies to follow in determining whether or not a proposed project might have a significant effect on the environment. The criteria would require a finding of "significant effect on the environment" if the proposed project had the potential to degrade the quality of the environment, curtail the range of environment, or to achieve short-term to the disadvantage of long-term environmental goals. The same finding would be required if the possible effects of a project, although individually limited, were accumulatively considerable or if the project would cause substantial adverse effects, either directly or indirectly, on human beings.

One of the most significant sections of the guidelines adopted by the Secretary of the Resources Agency is to be found in the list of classes of projects determined not to have a significant effect on the environment and, therefore, exempt from the provisions of the CEQA. The significance of the list of exempt classes is readily apparent from a consideration of the procedure followed in determining whether the preparation of an environmental impact report is required for a certain undertaking. The thrust of the initial review of a proposed action is to determine whether an environmental impact is required. The first step is to determine whether there is a possibility that the activity may have a significant effect on the environment. If it can have no possible significant effect, then no EIR is required.

However, if it does have a possible significant effect, then the public agency must determine if the activity meets the definition of a "project". If not, no EIR is required. But if it does fall within the definition of "project", then the public agency must determine if the "project" is administerial, discretionary, or emergency. If it is administerial, or an emergency, then no environmental impact report is required. If it is discretionary, then the public agency must determine if the project is categorically exempt. If it is not categorically exempt, then the lead agency must undertake an initial study to determine if the project will not have a significant effect on the environment. In this event, the lead agency will prepare a negative declaration for review prior to a final decision on the project. On the other hand, if the initial study determines that the project may have a significant effect, then the lead agency prepares or causes to be prepared a draft EIR. The lead agency then files a notice of completion with Secretary for Resources and distributes the draft EIR for comments of interested parties. After comments are received on the draft EIR, the lead agency prepares a final EIR reflecting the reactions to significant review comments. Once the final EIR is approved by the decision-maker, a notice of determination is filed with the Secretary for Resources and the project is then begun.

One of the court findings in the Friends of Mammoth suit which is of particular interest to those of us working on biological programs is that, in addition to extending the application of the CEQA to the activities of private individuals, it also extended the application of the Act to activities other than construction programs. This then has the potential to include all activities including biological programs.

In making the determination as to whether or not an environmental impact report is required for a certain activity, it is essential that some documentation of the initial review be constructed and preserved. This also applies to those instances where a determination is made that a negative declaration is the suitable document as well as where a determination is made that an EIR should be prepared. It should be remembered in considering the subject of environmental impact reports that the CEQA specifically requires the governmental agencies to make a determination as to whether the proposed action is discretionary. It should be remembered that the CEQA provides that in a legal action challenging a decision of a public agency because of an alleged violation of CEQA, the courts may only determine whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded as required by law or if the decision was not supported by substantial evidence in the records. In the event the public agency decided there were compelling reasons to approve a project in spite of anticipated serious environmental effects projected in the EIR, but the only evidence in the record was the EIR, the agency's decision could be attacked as an abuse of discretion. In circumstances such as these, it would probably be to the agency's advantage to prepare a statement of overriding considerations which would become part of the record on which a court decision would be based.

The Resources Agency recently reported in its California EIR monitor of February 8, 1974, that as a result of a partial survey among selected counties of law suits initiated under the California Environmental Quality Act, that over half the challenges were based on the adequacy (or inadequacy) of the EIR on the proposed project. The challenges usually stemmed from the manner in which an EIR dealt with (1) the environmental impacts of the project; (2) mitigation measures designed into the project plan to reduce environmentally adverse impacts; (3) alternatives to the project which could feasibly attain the basic objectives of the project. Cases challenging the adequacy of EIR's incorporated one or more of these points as their basis for complaint. The point being, of course, that as the agencies, environmental groups, and the courts gain more experience with the CEQA and environmental impact reports, the concerns shift from whether an EIR was prepared at all to whether the EIR prepared is adequate in its presentation of the project information and implementation plans. The study indicates that more care must be taken by those preparing environmental impact reports to see that all requirements of the CEQA, the guidelines governing preparation of EIR's, and information used in the preparation meet the high standards to be expected of professional level government employees. When a court upholds a complaint that an EIR is inadequate to sustain a decision made by a government unit, it is a direct reflection on the professional adequacy of that unit. There is little chance that the CEQA will be repealed; there is more chance it will be enlarged by amendment. Therefore, each government organization and each individual professional employee would be well advised to become thoroughly familiar with the provisions of the CEQA and the Resources Agency guidelines and proficient in the preparation, interpretation, evaluation, and presentation of environmental impact reports. This is particularly true for those groups engaged in programs involving biological entities since these are part of the environment.