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ENVIRONMENTAL IMPACT REPORTS UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT: THE NEW LEGAL FRAMEWORK

Richard G. Hildreth*

INTRODUCTION

The California Environmental Quality Act (CEQA),1 which is patterned after the National Environmental Policy Act (NEPA),2 attempts to minimize the adverse environmental effects of public and private projects.3 The device selected for accomplishing this legislative goal is the Environmental Impact Report (EIR), which measures the probable environmental effects of these proposed projects.4 Governmental authorities, such as county boards of supervisors, use the information in the EIR either to disapprove harmful proposals in favor of less harmful alternatives or to require specific environmental

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1. CAL. PUB. RES. CODE §§ 21000-21176 (West Supp. 1976). All references to CEQA are to the Public Resources Code. This article encompasses amendments to CEQA and the California Administrative Code, effective January 1, 1977, and relevant judicial decisions reported through August 15, 1977.


3. CEQA defines project to include:
   (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.

   The California courts have construed the term project broadly "to include any private activity for which a permit is required, and . . . all that must be shown is that the government has 'some minimal link with the activity, either by direct propriety interest or by permitting, regulating, or funding private activity.'" Natural Resources Defense Council, Inc. v. Arcata Nat'l Corp., 59 Cal. App. 3d 959, 966, 131 Cal. Rptr. 172, 176 (1976) (quoting language from Friends of Mammoth v. Board of Supervisors, 8 Cal. 3d 247, 262-63, 502 P.2d 1049, 1059, 104 Cal. Rptr. 761, 771 (1972)). The projects subject to CEQA range from public and private activities such as the construction of freeways and shopping centers to changes in local zoning ordinances.

protection measures as a condition of approval. CEQA provides an array of detailed definitions and procedures but, unfortunately, little guidance on how to comply with its requirements for either those who draft and review EIRs or those who utilize them in making decisions about proposed projects.

This article focuses on the information that should be included in an EIR. It is written for those involved in the preparation of EIRs and those charged with passing on the legal sufficiency of the documents presented for approval. In addition, this article examines the role of the judiciary in the EIR process, highlighting the fact that judicial decisions interpreting CEQA are an important source of information on compliance with CEQA's requirements.

**CONTENTS OF AN ENVIRONMENTAL IMPACT REPORT**

The sources setting forth the information that must be contained in an EIR include state guidelines implementing CEQA contained in the California Administrative Code, local

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5. CEQA states:

An environmental impact report is an informational document which...

6. CEQA does not require the decisionmaking agency to actually prepare the EIR for a project, but rather allows the EIR to be prepared under contract for the agency by a private consulting firm. CAL. PUB. RES. CODE § 21082.1 (West Supp. 1976).

7. CEQA requires the preparation of an EIR only if the project “may have a significant effect on the environment.” CAL. PUB. RES. CODE § 21100 (West Supp. 1976) (emphasis added). Discussion of the procedures and standards for determining that a proposed project may have a significant effect on the environment is beyond the scope of this article.
government ordinances and guidelines implementing CEQA, and judicial decisions. These sources indicate that the most important elements of an EIR are discussions of the significant environmental impacts of and alternatives to the project, measures to mitigate the project's harmful effects if it is approved, comments on the project by government agencies other than the lead agency, comments by the general public, and the responses of the lead agency to these comments. To set the stage for these key elements, the EIR should begin with a description of the proposed project.

Project Description

The project description principally is designed to provide government agencies and the general public with a point of reference from which to evaluate the potential environmental effects of the project. It should present the project's technical, economic, and environmental characteristics, along with a statement describing the project's objectives. A timetable detailing the construction methods involved in a construction project is advisable. In addition, a topographic map, showing the project's exact boundaries, and a regional map, locating the project site, should be included.

Next, the environmental conditions surrounding the project should be described from both a local and regional perspective.
The purpose of this description is to define a baseline from which the project's environmental effects can be measured. The historical background and cultural resources of the area surrounding the project should be discussed. Then, such matters as air quality, water resources, climate, soil type, vegetation, and wildlife should be investigated and described.\(^\text{17}\) The state guidelines emphasize the need for a regional approach in the EIR that is designed to discover threats to unique resources of the area and to determine the cumulative impact of the proposed project when combined with the effects of other projects.\(^\text{18}\) Thus, the drafter of an EIR for a relatively discrete project such as a housing subdivision may find it necessary to address subjects as broad as the region's water supply, air pollution, and growth problems.

Finally, certain of the proposed project's legal aspects should be presented as part of its description.\(^\text{19}\) This portion of the EIR should include the extent to which the project complies with national, state and local pollution standards as well as zoning ordinances and land use plans adopted by the community where the project is to be located.\(^\text{20}\)

**Environmental Impact, Mitigation Measures, and Alternatives**

The primary purpose of an EIR is "to identify the significant effects of a project on the environment, to identify alternatives to the project, and to indicate the manner in which such significant effects can be mitigated or avoided."\(^\text{21}\) Conse-

\(^{17}\) The state guidelines require that an EIR "include a description of the environment in the vicinity of the project, as it exists before commencement of the project." Id. § 15142.


\(^{19}\) CAL. ADMIN. CODE tit. 14, § 15142 (1977).

One of CEQA's purposes is, of course, to force decisionmaking agencies to consider the cumulative environmental impact of a series of projects. See, e.g., CAL. PUB. RES. CODE § 21003(e) (West Supp. 1976).


\(^{21}\) See, e.g., id. § 15145 (water quality standards).

\(^{22}\) CAL. PUB. RES. CODE § 21002.1(a) (West Supp. 1976).

Recent critiques of environmental impact statements prepared pursuant to the National Environmental Policy Act suggest that project descriptions tend to be unnecessarily long and that insufficient effort is devoted to more important elements of the report. See COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL IMPACT STATEMENTS: AN ANALYSIS OF SIX YEARS EXPERIENCE BY SEVENTY FEDERAL AGENCIES 52 (1976).

Under CEQA the policy is to "omit unnecessary descriptions of projects and emphasize feasible mitigation measures and alternatives to projects" in environmental impact reports. See, e.g., CAL. PUB. RES. CODE § 21003(c) (West Supp. 1976).
quently, CEQA specifically requires that an EIR discuss the following related and sometimes overlapping topics:

(a) The significant environmental effects of the proposed project;
(b) Any significant environmental effects which cannot be avoided if the project is implemented;
(c) Mitigation measures proposed to minimize the significant environmental effects including, but not limited to, measures to reduce wasteful, inefficient, and unnecessary consumption of energy;
(d) Alternatives to the proposed project;
(e) The relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity;
(f) Any significant irreversible environmental changes which would be involved in the proposed project should it be implemented;
(g) The growth-inducing impact of the proposed project.

These seven topics are discussed in further detail in the state guidelines implementing CEQA. Four will be considered here: the project’s significant environmental effects, measures available to mitigate those significant effects that cannot be avoided, alternatives to the project, and the project’s growth-inducing impact. Under a recent amendment to CEQA, the topics of short-term uses, long-term productivity, and irreversible environmental changes need not be discussed for most projects. In light of CEQA’s focus, if an EIR is to withstand agency review and public scrutiny, it should provide a full and detailed discussion of the four mandatory areas.

**Significant environmental effects.** CEQA defines “significant effect” on the environment as a “substantial, or

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25. The amendment requires that an EIR include these items only in connection with:
   (a) The adoption, amendment, or enactment of a plan, policy, or ordinance of a public agency.
   (b) The adoption by a local agency formation commission of a resolution making determinations.
   (c) A project which will be subject to the requirement for preparing an environmental impact statement pursuant to the requirements of the National Environmental Policy Act of 1969.

potentially substantial, adverse change in the environment." Thus, an EIR should discuss all adverse environmental impacts that are relatively serious and have a firm basis in fact. Although no specific test exists for determining what is a "significant effect," some factors to be considered include whether a project could affect unique or critical resources, cause cumulative impacts, restrict important future options, establish a precedent or otherwise create pressure for additional projects, or cause unusual controversy. In addition, reasons must be given in support of a determination that a known effect is not significant.

Miscellaneous references in CEQA and the state guidelines as well as basic environmental awareness suggest that


To the extent that project impacts are uncertain or unknown, the law is unclear about how much research, if any, must be performed and reported in the EIR. Some federal courts, interpreting NEPA, have required a reasonable amount of research to fill in any important gaps in knowledge relevant to a project's impacts. See, e.g., Environmental Defense Fund v. Hardin, 325 F. Supp. 1401, 1404 (D.D.C. 1971). But cf. Society for Cal. Archaeology v. County of Butte, 65 Cal. App. 3d 859, 135 Cal. Rptr. 679 (1977) (not mandatory, under CEQA, for an agency to conduct every test and perform all research, study and experimentations recommended to it to determine the true and full environmental impact prior to approval). The sounder view would suggest that the report clearly note any uncertainties or disagreements concerning the project's impacts.


When determining the significance of a particular impact, EIR preparers must bear in mind the fact that a project's environmental impacts occur at different times and on various scales. In the course of a construction project, for example, materials are transported and consumed through construction techniques that have varying impacts, while the completed project and its intended use have a new and different impact on the surrounding environment, as well as secondary and indirect effects away from the project location.


The degree of specificity with which impacts should be discussed depends on the nature of the project and the severity of the particular impact. Section 15147 of the state guidelines recognizes that the effects of a construction project can be predicted with greater accuracy than can the effects of amendments to the local general plan and zoning ordinance. An EIR prepared by the planning department on such amendments would focus on the development patterns expected to flow from the plan and zoning changes, unless information was available on specific development projects ready to proceed under the new plan and zoning.

possible impacts to be considered for each stage of a project include physical alteration of land, wetlands, and bodies of water;\(^3\) noise, water, and air pollution (including motor vehicle emissions generated by the project); energy\(^3\) and water consumption; disposal of solid waste and hazardous materials;\(^3\) effects on historical sites, mineral resources, and plant and animal species;\(^3\) exposure to hazards such as flooding and earthquakes;\(^3\) conflicts with established recreational, educational, religious, or scientific uses of the area\(^3\) and scenic and aesthetic effects.\(^3\) Appendix G of the state guidelines implementing CEQA provides a convenient checklist for evaluating a proposal's environmental effects.\(^3\)

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32. Id. app. G; see note 37 infra.
35. See id.

The analyses and conclusions in the EIR should be quantitative rather than qualitative wherever possible so as to better enable the reader to form his or her own opinions. For example, instead of stating "the proposed building will obstruct the view to a small portion of the shoreline," the EIR should state "The proposed building would be located between the beach and Highway 1. From Highway 1 the view of approximately 300 feet of shoreline would be completely obstructed by the building." Ultimately the EIR should focus attention on and provide in-depth discussion of the most serious effects. Thus the drafting team must include a person with the ability to evaluate and edit the work of a number of disciplines.

37. Appendix G of the state guidelines for the implementation of CEQA provides:

A project will normally have a significant effect on the environment if it will:

(a) Conflict with adopted environmental plans and goals of the community where it is located;
(b) Have a substantial, demonstrable negative aesthetic effect;
(c) Substantially affect a rare or endangered species of animal or plant or the habitat of the species;
(d) Interfere substantially with the movement of any resident or migratory fish or wildlife species;
(e) Breach published national, state, or local standards relating to solid waste or litter control;
(f) Substantially degrade water quality;
(g) Contaminate a public water supply;
(h) Substantially degrade or deplete ground water resources;
(i) Interfere substantially with ground water recharge;
(j) Disrupt or alter an archaeological site over 200 years old, an historic site or a paleontological site except as part of a scientific study of the site;
(k) Induce substantial growth or concentration of population;
The extent to which a project's psychological and social effects should be discussed in an EIR is uncertain. Although CEQA refers to the significance of any "adverse effects on human beings," the environment is defined solely in terms of physical conditions. Early judicial decisions under NEPA treated psychological and social impacts as within the scope of a federal environmental impact statement. Later decisions, however, are not so clear. In any case, a discussion of these effects makes an EIR more useful to members of the surround-

(l) Cause an increase in traffic which is substantial in relation to the existing traffic load and capacity of the street system;
(m) Displace a large number of people;
(n) Encourage activities which result in the use of large amounts of fuel or energy;
(o) Use fuel or energy in a wasteful manner;
(p) Increase substantially the ambient noise levels for adjoining areas;
(q) Cause substantial flooding, erosion or siltation;
(r) Expose people or structures to major geologic hazards;
(s) Extend a sewer trunk line with capacity to serve new development;
(t) Substantially diminish habitat for fish, wildlife or plants;
(u) Disrupt or divide the physical arrangement of an established community;
(v) Create a public health hazard or a potential public health hazard;
(w) Conflict with established recreational, educational, religious or scientific uses of the area;
(x) Violate any ambient air quality standard, contribute substantially to an existing or projected air quality violation, or expose sensitive receptors to substantial pollutant concentrations.


41. See, e.g., Tierrasanta Community Council v. Richardson, 6 E.R.C. 1065 (S.D. Cal. 1973) (federal youth facility proposed for San Diego, California).

42. The environmental impact statement required by NEPA is very similar to an EIR prepared under CEQA. See 42 U.S.C. § 4332(C) (Supp. III 1973). But see note 22 supra.

43. See, e.g., Breckenridge v. Rumsfeld, 9 Evt'l. Rep. 1059 (6th Cir. 1976) (social and economic disruptions resulting from the abandonment of an army post did not constitute an impact on the human environment requiring the preparation of an environmental impact statement):
ing community whose principal concern is likely to be the project's impact on their quality of life.\textsuperscript{44}

\textit{Mitigation measures.} CEQA requires "mitigation measures proposed to minimize the significant environmental effects" of a project to be discussed in the EIR,\textsuperscript{45} including "measures to reduce [the] wasteful, inefficient, and unnecessary consumption of energy."\textsuperscript{46} The state guidelines emphasize this point by stating that each available mitigation measure should be discussed and that the reasons for selecting a particular measure should be outlined.\textsuperscript{47} The guidelines also emphasize reducing the project's energy consumption whenever possible.\textsuperscript{48}

The concept of mitigation measures can be illustrated by considering a proposed limited-access highway for a metropolitan area. Industrial, commercial, and residential development can be expected along the highway corridor, particularly at the entrance and exit points. Thus, the development impact of the highway can be mitigated by reducing the number of these access points. An alternative or additional mitigation measure would be stringent regulation of development along the corridor itself.

\textsuperscript{44} The state guidelines support the inclusion of psychological and social effects in an EIR by suggesting that a disruption or division of the physical arrangement of an established community is a significant effect. \textsc{Cal. Admin. Code} tit. 14, §§ 15000-15192 app. G (1977); see note \textsuperscript{37} supra.


\textsuperscript{46} \textit{Id.}

\textsuperscript{47} \textsc{Cal. Admin. Code} tit. 14, § 15143(c) (1977). This section states:

\begin{quote}
Describe significant, avoidable, adverse impacts, including inefficient and unnecessary consumption of energy, and measures to minimize these impacts. The discussion of mitigation measures shall distinguish between the measures which are proposed by project proponents to be included in the project and other measures that are not included but could reasonably be expected to reduce adverse impacts. This discussion shall include an identification of the acceptable levels to which such impacts will be reduced, and the basis upon which such impacts will be reduced, and the basis upon which such levels were identified. Where several measures are available to mitigate an impact, each should be discussed and the basis for selecting a particular measure should be identified. Energy conservation measures, as well as other appropriate mitigation measures, shall be discussed when relevant. Examples of energy conservation measures are provided in Appendix F.
\end{quote}

\textsuperscript{48} \textit{Id.} §§ 15000-15192 app. F. Appendix F provides an exhaustive discussion of the energy related aspects of an EIR. However, this emphasis on reducing energy important and are often more feasible to implement. The possible measures range from changes in design to more stringent legal controls, and projects should be evaluated accordingly.
Unavoidable significant effects. Mitigation of all the significant effects of a project may not be possible. Therefore CEQA requires an EIR to disclose any “significant environmental effects which cannot be avoided if the project is implemented.” The state guidelines implementing CEQA additionally require an explanation of any “significant impacts on any aesthetically valuable surroundings, or on human health.” For example, to the extent the limited-access highway discussed above would generate additional traffic in the metropolitan area, there would be an unavoidable increase in the metropolitan air pollution caused by the project’s implementation.

Project alternatives. Pursuant to section 21100(d) of CEQA, the state guidelines require the EIR to “[d]escribe all reasonable alternatives to the project or to the location of the project, which could feasibly attain the basic objectives of the project, and why they were rejected in favor of the ultimate choice.”

A full discussion of alternatives must evaluate the reasons for commencing a proposed project immediately as opposed to not going ahead at all or delaying the project pending further study. This requirement focuses attention on the positive values in the existing environment that will be lost if the project is undertaken.

Despite this focus on the existing environment, if the proposed project’s objectives are clearly defined in the EIR and accepted by the government decisionmaker, the no-project alternative is not likely to be adopted. Of course, government decisionmakers are particularly disinclined to give meaningful consideration to the no-project alternative when their own public works projects are involved. However, agencies or private parties who have drafted EIRs that are mere rationalizations

49. CAL. PUB. RES. CODE § 21100(b) (West Supp. 1976).
51. CAL. PUB. RES. CODE § 21100(d) (West Supp. 1976).
52. CAL. ADMIN. CODE tit. 14, § 15143(d) (1977). This section provides in relevant part: The specific alternative of “no project” must also always be evaluated, along with the impact. The discussion of alternatives shall include alternatives capable of substantially reducing or eliminating any significant environmental effects even if these alternatives substantially impede the attainment of the project objectives, and are more costly.

Id.
53. Id.
of previously made decisions to implement specific programs have been successfully challenged in the courts.\footnote{55}

A full discussion of alternatives to the project should not be limited to those achievable by the proposing agency or private party.\footnote{56} Again, using the example of a proposed limited-access metropolitan highway, the EIR should discuss the alternative of mass transit between the points served, even though the transit district rather than the highway department would have to provide the service.

Finally, alternatives with greater environmental benefits should be discussed even though they are more costly or achieve only some of the proposed project’s objectives.\footnote{57} These alternatives may range from different designs of the same basic project to nonstructural alternatives—for example, floodplain zoning as an alternative to construction of a dam.

Generally, as a project’s dollar costs increase, the range of feasible alternatives widens. Also, the greater the project’s environmental impact, the wider the range of alternatives that should be considered, within reasonable limits related to the particular project being evaluated. For example, an EIR for a proposed shopping center probably does not have to consider the alternative of outhouses as opposed to plumbing but should consider water conservation measures that are feasible in modern plumbing systems. The alternatives should be described in sufficient detail so that the decisionmaking body can respond meaningfully to them and so that the public in turn can evaluate the choices being made by the decision-makers.

\textit{Growth-inducing impacts}. Although CEQA clearly does not place any specific limits on growth it nevertheless demands that “[t]he growth-inducing impact of [a] proposed project” be discussed in the EIR.\footnote{58} The administrative guidelines to CEQA indicate that “growth” refers to both economic and population growth\footnote{59} occurring directly or indirectly as a result of growth.

\footnote{55. See Natural Resources Defense Council v. Morton, 458 F.2d 827 (D.C. Cir. 1972) (decided under NEPA).}
\footnote{56. \textit{Id.}}
\footnote{57. See \textit{CAL. ADMIN. CODE} tit. 14, § 15143(d) (1977).}
\footnote{58. \textit{CAL. PUB. RES. CODE} § 21100(g) (West Supp. 1976).}
\footnote{59. Population and growth projections, as well as other statistical data relied upon, such as cost-benefit analyses, should be clearly identified. However, the body of an EIR should be comprehensible to government decisionmakers (often elected officials) and laypeople, with technical analyses and statistical data in appendices or otherwise available.}
Thus, an EIR prepared by a developer seeking to rezone an area of a city so that a factory may be constructed should explore the impact employees of the factory will have on existing community resources such as hospitals and housing, as well as similar impacts generated by other factories likely to be attracted to the rezoned area.

It remains unclear, however, whether growth impacts are to be treated as per se adverse. Perhaps, as the state guidelines suggest, the net effect of growth induced by a project is to be evaluated on a case-by-case basis. Of course the potential mitigating effects of any growth control program applicable in the project area should be evaluated in the EIR.

Concluding an Environmental Impact Report

A draft EIR can be conveniently ended by listing the name of the public agency or private consulting firm that prepared the report, together with all government agencies and other public and private organizations and individuals consulted in its preparation. The focus here is on the groups responsible for the substance of the draft EIR. When the report is completed, a summary and index or table of contents should be prepared and added to the report.

Once a draft EIR has been prepared by the responsible group or agency, it must be circulated to other public agencies and made available to the general public for comment.

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60. The state guidelines accompanying this element of an EIR require a discussion of the ways in which the proposed project could foster economic or population growth, either directly or indirectly, in the surrounding environment. Included in this are projects which would remove obstacles to population growth (a major expansion of a waste water treatment plant might, for example, allow for more construction in service areas). Increases in the population may further tax existing community service facilities so consideration must be given to this impact. Also discuss the characteristic of some projects which may encourage and facilitate other activities that could significantly affect the environment, either individually or cumulatively. It must not be assumed that growth in any area is necessarily beneficial, detrimental, or of little significance to the environment. CAL. ADMIN. CODE tit. 14, § 15143(g) (1977).

61. See id.

62. The state guidelines require the inclusion of "[t]he identity of all federal, state or local agencies, other organizations and private individuals consulted in preparing the EIR, and the identity of the persons, firm or agency preparing the EIR, by contract or other authorization" must be given. Id. § 15144.

63. See CAL. PUB. RES. CODE § 21061 (West Supp. 1976).

64. See note 11 supra.
Circulation of EIRs and Agency Decisions Based on Their Contents

Agency Review and Circulation of EIRs

After receiving an EIR from the drafting agency, the reviewing agency must comment on its sufficiency in light of the requirements outlined in CEQA. The drafting agency must then respond to these comments through revision of the EIR or attachments to it. In either form, the responses must explain how significant environmental issues raised by the comments have been resolved. Also, if the comments make specific suggestions such as additional mitigation measures or project alternatives, the responses must contain any reasons for rejecting these suggestions and identify the factors that led to rejection. This comment-response phase of the EIR process is pivotal. The courts, when asked to review the adequacy of an EIR, assess the drafting agency's competence in both responding to critical comments and preparing the initial draft of an EIR.

These comments and responses are then collected in the final EIR. The state guidelines require that a final EIR consist of the draft EIR, comments received during review of the EIR, a list of the people and entities commenting and the responses of the preparing agency to the comments. The collected information is then submitted to the lead agency that has the responsibility of approving the proposed project. When it receives the final EIR, the lead agency must then weigh the economic, social, and environmental factors involved and make a decision on the project.

Agency Decisions Based on Final EIRs

CEQA states that an EIR "is an informational document which . . . shall be considered" by the decisionmaking agency prior to approval or disapproval of a project. In addition, the state guidelines require the decisionmaking agency to certify in writing that it has reviewed and considered the EIR pre-

66. Id.
67. See notes 89-92 and accompanying text infra.
69. See note 10 supra.
70. CAL. PUB. RES. CODE § 21061 (West Supp. 1976) (emphasis added).
pared by the drafting agency in reaching its decision." However, the requirement that the information revealed in an EIR be considered does not indicate how much weight a decision-making agency should give the information—even that information disclosing the project's damage to the environment. On the one hand, two policy sections of CEQA state that private and public activities should be regulated so that "major consideration is given to preventing environmental damage" and that "the long-term protection of the environment [should] . . . be the guiding criterion in public decisions." On the other hand, both CEQA and the accompanying state guidelines permit the agency to balance economic and social factors against environmental damage in reaching a decision. Thus, although under CEQA environmental values are apparently "assigned greater weight than the needs of economic growth," exactly how much weight has yet to be decided. The practical problems in implementing such a principle are great. No one has yet determined how to convert economic benefits and environmental costs into comparable units.

Unfortunately, the recent amendments to CEQA and the state guidelines do not clarify this issue. They do, however, impose important new requirements on agency decisionmaking. Under the amendments, whenever an EIR discloses a significant adverse environmental effect, no public agency may approve or carry out a project without making one of the following findings:

(a) Changes or alterations have been required in, or incorporated into, such project which mitigate or avoid the significant environmental effects thereof as identified in the completed environmental impact report.
(b) Such changes or alterations are within the responsibility and jurisdiction of another public agency and such changes have been adopted by such other agency, or can and should be adopted by such other agency.

72. CAL. PUB. RES. CODE § 21000(g) (West Supp. 1976) (emphasis added).
73. Id. § 21001(d) (emphasis added).
74. Id. § 21002.
76. San Francisco Ecology Center v. City & County of San Francisco, 48 Cal. App. 3d 584, 591, 122 Cal. Rptr. 100, 104 (1975). The court acknowledged that this point was an important difference between CEQA and NEPA. Id.
(c) Specific economic, social, or other considerations make infeasible the mitigation measures or project alternatives identified in the environmental impact report. 78

Furthermore, under the amended state guidelines, any such finding must be supported by substantial evidence in the record before the agency. 79

Though the impact of these amendments is uncertain, they definitely have the potential to force agencies, whenever feasible, to mitigate effects of projects to a much greater degree than previously required. However, those responsible for the preparation of EIRs may now be tempted to label as insignificant many impacts formerly designated as significant in order to avoid the stringent new requirements.

Additionally, this increased focus on mitigation measures may generate new problems, for determining whether mitigation is feasible can be a difficult task. One can readily conceive of an aggressive public agency proposing measures to mitigate the adverse environmental effects of a project that it believes can easily be implemented. However, the proponent of the project may not share this view and might abandon it entirely. Abandonment of the project of course preserves the environment at least temporarily, but it also may hinder the accomplishment of other public policies such as increasing central city housing supply. For example, a developer proposes to build a 200-unit housing project in a downtown area. In reviewing the proposal, the local planning department recommends a smaller scale, 150-unit project with fewer adverse environmental impacts. If the rate of return on investment in a 150-unit project is unattractive to the developer, he may abandon the project entirely in favor of further downtown office and commercial development, which, ironically, may produce more severe environmental impacts than did the original 200-unit housing proposal. Alternatively, if the developer insists that a 200-unit housing project is the only economically feasible use of the site, the courts may ultimately have to resolve the dispute.

After the lead agency has made its determination based on the final EIR and other considerations, one step remains in the EIR process. The decision of the lead agency remains open to review in the courts, at the behest of interested parties who are unhappy with it.

78. *Id.*
ROLE OF THE COURTS IN THE EIR PROCESS

CEQA vests California public agencies with the primary responsibility for preparing EIRs and deciding whether to approve the projects evaluated in them. However, this mandate does not prevent dissatisfied parties from attacking in the court either the analysis in an EIR or the agency decision based upon it.

CEQA includes general provisions designed to aid the courts in defining their role in the EIR process. Although these provisions do not permit the courts to engage in de novo review of an agency decision, they do allow courts to reverse an agency's ruling when the agency has abused its discretion.

In order to determine whether an agency has abused its discretion, the courts must interpret CEQA, the state guidelines, and local ordinances and guidelines. Thus, judicial opinions provide an important source of information on how to comply with CEQA and with the implementing state and local guidelines. The opinions demonstrate a willingness on the part of the courts to intervene when they find a procedural defect in an EIR or a failure by an agency to consider the information in the EIR when making its decision. The courts are less willing to interfere, however, in agency judgments that have weighed a project's environmental costs against its social and economic benefits.

Procedural Defects in Environmental Impact Reports

An obvious procedural defect in an EIR, such as the failure to respond to critical comments or to discuss the alternative of

81. See id. §§ 21167-21176.
82. Id. §§ 21168, 21168.5.
83. Id. Section 21168.5 provides:
In any action or proceeding other than an action or proceeding under Section 21168, to attack, set aside, void or annul a determination, finding, or decision of a public agency on the grounds of noncompliance with this division, the inquiry shall extend only to whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.

84. The California Supreme Court has yet to decide a case involving a challenge to the adequacy of an EIR or of an agency decision based on an EIR; thus, California court of appeal cases provide the only source of guidance on the requirements for an adequate EIR.
no-project\textsuperscript{85} may result in a court enjoining work on a project until the defect is cured. This approach is illustrated by \textit{Environmental Defense Fund v. Coastside County Water District},\textsuperscript{86} a case involving a public works project designed to double the defendant district’s water supply. The EIR prepared for the district was successfully challenged by the Environmental Defense Fund and the California Attorney General\textsuperscript{87} for failing to discuss the integrated nature of the entire project\textsuperscript{88} and for neglecting to respond to public and expert criticism leveled at the project.\textsuperscript{89} Significantly, in finding the EIR inadequate, the \textit{Coastside} court became the first of many to refer to federal practices under NEPA to determine how CEQA should operate.\textsuperscript{90}

In contrast, in \textit{San Francisco Ecology Center v. City and County of San Francisco},\textsuperscript{91} the court approved an EIR for a public works project expanding San Francisco International Airport despite the charge that the EIR was procedurally defective for overestimating the number of passengers who would use the airport and for failing to respond adequately to critical comments concerning the increased air and noise pollution and increased tax burdens on San Francisco residents that the expansion would engender. The court, in upholding the EIR,

\textsuperscript{85} See County of Inyo v. City of Los Angeles, 71 Cal. App. 3d 185, 139 Cal. Rptr. 396 (1977) (EIR that failed to meaningfully discuss no-project alternative successfully challenged).

\textsuperscript{86} 27 Cal. App. 3d 695, 104 Cal. Rptr. 197 (1972).

\textsuperscript{87} Id. at 699-700, 104 Cal. Rptr. at 199. For insight into the California Attorney General’s role in enforcing environmental laws, see \textit{Senate Comm. on Interior and Insular Aff., The Council on Environmental Quality: Responses to a Committee Questionnaire} 19-20 (1977).

\textsuperscript{88} 27 Cal. App. 3d at 706-07, 104 Cal. Rptr. at 203.

\textsuperscript{89} For a more recent decision involving a similar EIR defect, see County of Inyo v. City of Los Angeles, 71 Cal. App. 3d 185, 139 Cal. Rptr. 396 (1977).

\textsuperscript{90} 27 Cal. App. 3d at 707-08, 104 Cal. Rptr. at 204.

\textsuperscript{91} The same failure to respond to critical comments was seized upon by the court of appeal in People v. County of Kern, 39 Cal. App. 3d 830, 115 Cal. Rptr. 67 (1974), a case involving a private development proposal. The court ruled defective an EIR for a 356-lot subdivision on 275 acres located within the Los Padres National Forest in the mountains of Kern County. The EIR consisted of nine pages submitted by the developer’s engineering consultants and nine pages added by the county, plus numerous critical comments from public agencies and private individuals. Among the problems raised by the comments, but unanswered in the final EIR, were the inadequacies of water supply, electrical facilities, and fire protection, the potential for ground water pollution and air pollution damage to trees, adverse impacts on nearby youth camps and on the historical and archeological value of the area, and the fact that the subdivision site was directly over the San Andreas Fault. \textit{Id.}

\textsuperscript{90} 27 Cal. App. 3d at 701-02, 104 Cal. Rptr. at 200.

\textsuperscript{91} 48 Cal. App. 3d 584, 122 Cal. Rptr. 100 (1975).
noted that the responses to the critical comments were not exhaustive, but ruled that it was enough that they "evince good faith and reasoned analysis" by the agency preparing the statement.\(^{92}\)

So long as the courts limit their review of EIRs to essentially procedural defects, government decisionmakers must depend on both private consultants and government staff to draft competent EIRs. The decisionmakers must also depend on the public's diligence in reviewing and commenting upon draft EIRs to generate accurate project evaluations. After the preparers and commentators do their job, the question arises about the extent to which courts require decisionmakers to actually consider the EIR in reaching a decision on a proposed project.

**Failure to Consider the Environmental Impact Report**

There is a range of actual responses to an adequate EIR once one has been prepared. Some decisionmakers may not even read the EIR.\(^{93}\) Others may read it but then ignore its evaluation in reaching a decision on the proposal. Still others may take to heart an EIR's disclosure of significant environmental effects and deny approval of the proposed project. The courts review this range of possible responses against CEQA's requirement that decisionmakers "consider" the EIR.\(^{94}\) When the facts seem to suggest that decisionmaker did not consider the EIR or did not rely on the EIR in reaching a decision, the courts will intervene.

An example of such intervention is *Burger v. County of Mendocino*,\(^{95}\) in which the construction of an eighty-unit motel was proposed in the unique Pygmy Forest area on the Mendocino coast. The EIR prepared by a private consultant detailed

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92. *Id.* at 596, 122 Cal. Rptr. at 108.

*San Francisco Ecology Center* also held that the fact that experts disagreed about the effects of a project did not render an EIR defective. Instead, the court indicated that conflicting conclusions should be submitted to the decisionmaking agency for its consideration. *Id.* at 594, 122 Cal. Rptr. at 107; accord, *City of Rancho Palos Verdes v. City Council of Rolling Hills Estates*, 59 Cal. App. 3d 869, 894, 129 Cal. Rptr. 173, 186, (1976). Because reputable experts frequently disagree, this solution is perhaps the best one, for it does not force the preparing agency or the court to choose which of the conflicting opinions the decisionmaking agency may consider. However, the preparing agency should independently evaluate the conflicting expert opinions to aid the decisionmaking agency in resolving the conflict.


94. *See* [CAL. PUB. RES. CODE § 21061 (West Supp. 1976)].

many adverse effects of the eighty-unit proposal upon the environment and recommended instead a sixty-four-unit motel with some relocation of buildings. The developer contended that this alternative was not economically feasible.

The decisionmaking agency, the county board of supervisors, held a public meeting at which opposing views on the project were presented and subsequently adopted a resolution finding that the EIR was adequate, thorough, and complete, and stating that the board had "made a full consideration of the environmental impact report . . . and conclude[d] thereon that the general welfare and public interest [would] best be served by the proposed development being approved." The court found the board's decision approving the eighty-unit project unacceptable. The court noted that although the board stated that it had considered the EIR, it did not indicate whether the adverse effects detailed in it could be avoided or reduced by specific mitigation measures, or that the adverse effects were outweighed by specific economic, social, and environmental benefits of the motel. The court concluded that even if the board had made such specific findings in its resolution, its decision was nevertheless defective because no evidence had been presented to the board supporting the findings.

Burger and similar cases indicate that the courts, when interpreting CEQA, will demand evidence that the decisionmaking agency has considered the EIR and adequately dealt with all the adverse effects the EIR discloses. The recent amendments to CEQA support this view, for they require decisionmakers to specifically identify all economic, social, or other factors leading to their approval or rejection of proposed projects. Even if the facts suggest that the decisionmaker considered the EIR in making its decision, the question remains whether the agency adequately considered the project's environmental costs if it approved the project or the project's economic and social benefits if it did not.

96. Id. at 325-36, 119 Cal. Rptr. at 570.
97. Id. at 326, 119 Cal. Rptr. at 570.
98. Id. at 327, 119 Cal. Rptr. at 570.
100. 45 Cal. App. 3d at 326-27, 119 Cal. Rptr. at 570.
101. CAL. PUB. RES. CODE § 21081 (West Supp. 1976); see text accompanying notes 78-79 supra.
Weighing of Environmental Costs Against Social and Economic Benefits

When the facts reveal that a decisionmaking agency has specifically identified its reasons for a decision based on project evaluations in an EIR and other substantial evidence, courts are reluctant to second guess the agency's weighing of the project's environmental costs against its social and economic benefits. In such cases the courts have upheld an agency's disapproval of a project when the agency found that specific significant adverse environmental effects would be caused by the project and there was substantial evidence to support the agency's finding.

Thus, in *Carmel Valley View, Ltd. v. County of Monterey*, the court upheld the Monterey County Board of Supervisors' rejection of a proposed 305-unit subdivision because the EIR prepared on the subdivision disclosed a significant risk of ground water pollution from the subdivision's septic tanks and because the board of supervisors clearly relied on the EIR in rejecting the subdivision. Similarly, in *Coastal Southwest Development Corporation v. California Coastal Zone Conservation Commission*, the court upheld the coastal commission's rejection of a proposed nine-story motel adjacent to Oceanside Harbor, basing its decision on an EIR that disclosed significant cumulative adverse impacts of growth in Oceanside on the San Luis Rey River and Lagoon, on the wildlife and wildlife habitat in that area, on views of the harbor and ocean front areas, and on surrounding lower intensity land uses that would be forced out by higher property taxes.

The above cases can be viewed as ones in which the decisionmaking agency evaluated the project's environmental costs as outweighing its social and economical benefits. More difficult cases will arise when a project's social and economic benefits are assessed by the agency as equal to or greater than its environmental costs. The courts will then be faced with the task of deciding whether CEQA requires decisionmakers to assign greater weight to environmental costs in their evaluation as opposed to social and economic benefits, and if so, what the

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weighting factor should be.\textsuperscript{105}

Although the meaning of the words used in CEQA and the state guidelines are clarified when the courts apply them to concrete factual situations, those involved with the impact statement process should not lose sight of the fact that judicial opinions are only a small part of CEQA practice. Compared to the number of projects evaluated, the number of court cases decided under CEQA is extremely small. Nevertheless, the availability of judicial review probably improves the quality of environmental impact reports and agency decisionmaking, for both drafters and decisionmakers know their work may be subjected to judicial scrutiny. Also, the requirement that the decisionmaking agency, often a body of elected officials such as a city council or county board of supervisors, make specific findings concerning adverse environmental effects and the factors to be balanced against them based on substantial evidence helps inform the electorate of the social, economic, and environmental values held by their elected and appointed officials.

CONCLUSION

Under CEQA, EIR drafters must follow the content requirements outlined in the Act, the state guidelines, and local implementing ordinances and guidelines. The EIR must detail all facets of the project that may significantly affect the environment, evaluate measures to mitigate the project's significant environmental effects, present alternatives to the project, and carefully respond to criticism of the project. Each agency that must approve or disapprove the project must make findings, supported by substantial evidence, that demonstrate that the agency weighed the project's environmental costs against its social and economic benefits in reaching its decision. Also, before approving a project with significant adverse environmental effects, the agency must find that there are no feasible less harmful alternatives to the project and that all feasible mitigation measures have been incorporated into the project.

When EIR drafters and decisionmaking agencies deviate significantly from these fundamental requirements of CEQA, the courts are available to enforce compliance. However, the

\textsuperscript{105} See text accompanying notes 72-76 supra.
courts have left unresolved the issue of the extent to which they will review the relative weights assigned by a decisionmaking agency to a project's environmental costs and social and economic benefits.