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PROBABLE FUTURE PROJECTS: THEIR ROLE IN ENVIRONMENTAL ASSESSMENTS UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

I. INTRODUCTION

In 1972 the California Supreme Court rendered a decision which has exerted a profound influence on environmental law within the state. In *Friends of Mammoth v. Board of Supervisors of Mono County*¹ the court held that the California Environmental Quality Act (CEQA)² applied not only to government projects, but also to any private projects requiring governmental permit or entitlement.³ Thus, local government agencies were obliged to consider the potential environmental impact of private projects and to prepare environmental impact reports (EIRs) on those projects which might have a significant effect on the environment.⁴

This decision has generated an eight-year stream of litigation which reflects continued confusion over when an EIR is to be prepared, why it is to be prepared and how it is to be prepared. A review of these cases and the responses which they have provoked reveals a particular concern over CEQA's requirement that agencies must examine every proposed project in conjunction with "probable future projects" to determine if the proposed and future projects might exert some cumulatively significant effect on the environment.⁵ Such a duty

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1. 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972).
3. 8 Cal. 3d at 266, 502 P.2d at 1061, 104 Cal. Rptr. at 773.
5. *Id.* § 21083(b) provides that a project may have a significant effect on the environment if:

   The possible effects of a project are individually limited but cumulatively considerable. As used in this subdivision, "cumulatively considerable" means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of possible future projects.
imposes a significant burden on local agencies. It is difficult enough to examine proposals from a broad perspective aimed at assessing how a new project will interact with already completed projects and others still in progress. The obligation to consider future projects not yet begun, perhaps not even proposed, has provoked the ire of many local agency officials who believe that such inquiries produce nothing but idle speculation, and stand in the way of projects that would benefit the community.

Proponents of the expanded EIR argue that considering the cumulative effect of probable future projects and current proposals is necessary to carry out CEQA’s intent to afford maximum environmental protection. Looking ahead gives agencies a chance to plan carefully for a community’s future, to articulate and balance competing interests, and to modify proposed projects so as to mitigate potentially adverse effects on the environment. Failure to examine the interaction between present and future projects often prevents proposals from being as good as they might be, and in worst-case situations may produce consequences that are environmentally disastrous. Consider the following hypothetical situation.

Suppose that the Owner of 1000 acres of land in a semi-rural residential community conveys to Builder the option to buy 600 acres. In return for the option, Owner receives the right to share in the housing development that Builder will place on the land. Owner and Builder apply to the local planning commission for approval of a tentative map subdividing Owner’s land into two parcels, one of 600 acres and the other of 400 acres. This subdivision constitutes a “project” under CEQA§ and does not fall within the exemptions provided by the Act.7 The planning commission must determine whether this project may have a significant effect on the environment,

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6. CAL. PUB. RES. CODE §§ 21065(c), 21080 (West 1977 & Supp. 1981). Section 21065 defines “project” as including “[a]ctivities involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.” See, e.g., 60 Op. Cal. Att’y Gen. (1977) (lot splits of less than five acres are not excluded from CEQA requirements); CAL. PUB. RES. CODE § 21080(a) (West Supp. 1981) provides that “[e]xcept as otherwise provided in this division, this division shall apply to discretionary projects proposed to be carried out or approved by public agencies, including, but not limited to, . . . the approval of tentative subdivision maps. . . .”

7. Id. § 21080(b) (West Supp. 1981).
thus requiring preparation of an EIR. The planning commission, concluding that subdivision constitutes merely a line on a map, determines that the “project” has no environmental impact and that an EIR is therefore not necessary. The officials recognize that actual development may indeed affect the environment, but feel that it would be inappropriate to consider this effect prior to receiving actual plans for the housing project. Thus, the commission fails to consider impacts of probable future projects. The planning commission approves the subdivision without further environmental study, and shortly thereafter Owner sells his remaining 400 acres to a third party. Six months later Builder presents his development proposal to the planning commission and requests permission to begin building.

The proposed project includes construction of 300 homes. There is no public access to the property at present; therefore, roads must be put in before any other construction can begin. Owner's original 1000 acres included a natural location for a road that would have skirted a particularly beautiful portion of land currently designated in the town’s general plan as an “open space preserve.” Unfortunately, this perfect location lies just 100 yards outside the boundaries created by the subdivision map. According to the town's engineer, only two possible locations for a road into the proposed development remain. One location would result in the new road intersecting with the town’s main highway at a particularly dangerous blind curve across from the community recreation center. The other site would run directly through the open space preserve. A difficult choice!

Owner's original land holdings included 200 acres of geologically unstable terrain, 160 acres of which now lie in the portion that Builder hopes to develop. A slight alteration of boundaries could have included far more “buildable” land within Developer's portion, but the planning commission’s limited focus on the present project at the time it approved the subdivision map prevented it from taking into consideration the likely need for potential building sites in the future.

The alternatives at this point are rather limited. The planning commission could insist that Builder reduce the size of his development to 175 homes, but that might destroy the economic feasibility of the entire project. Builder may counter with a request that the planning commission allow him to disregard the town’s one-acre minimum lot size requirement and
allow him to cluster the homes in order to avoid the unstable land. In addition to the aesthetic problems posed by such a solution, officials must consider the fact that the only suitable location for clustering 300 homes lies across the road from the local elementary school. What will this mean in terms of changing traffic patterns and increased danger to children? Will prospective purchasers of these expensive homes be deterred by the prospect of having a school and all that goes with it practically in their front yards? Clearly, at least from hindsight, the planning commission has made an error, and the entire community will pay the price.

There is nothing far-fetched about the circumstances described above. Indeed, they are likely to become increasingly common in an era of shrinking land and expanding population. The need for increased housing and industrial facilities is bound to result in utilization of existing open space. To keep environmental damage to a minimum, CEQA requires agencies to keep these pressures and their implications in mind when assessing proposals for current projects. As illustrated above, attention to probable future projects can be beneficial, and the legislature has made it clear that consideration of such factors is important.

The means by which agencies are to fulfill this obligation is considerably less certain. There remain gnawing questions about the practicality of carrying out such a requirement in the absence of further clarification from the courts or legislature. For example, how "probable" must a probable future project be before an agency has to give it consideration? It seems fairly certain that if a local agency has received an application for permission to build as well as to subdivide, the building project is sufficiently imminent to be examined contemporaneously with the subdivision application. One step removed is the hypothetical situation described above where a subdivision was proposed first, but with the clear understanding on the part of the permitting agency that a request to build would follow in the not-too-distant future.

The agency's duty becomes more obscure in the case of an application to subdivide where no future plans are specified. Does the local agency have an obligation to inquire about purposes and future plans before approving such a project?

9. Id. § 21083(b) (West 1977) quoted at note 5 supra.
What if the land is zoned for residential use and the city's general plan envisions eventual development of that area? It is true that zoning can be changed and general plans amended. Nevertheless, formal recognition of a land parcel's suitability for future development might well create a presumption that some probable future project would be likely in the absence of rezoning or general plan amendment. Would the local agency have a duty to inquire about probable future projects if it knew that neighboring areas were experiencing significant housing pressures and had exhausted all available land? This presents a difficult situation to evaluate because pertinent data is hard to obtain. Common sense and examination of changing land use patterns in other nearby communities may lead an agency to believe that subdivision is just the first step to development in its own community. However, this view fails to account for a number of other variables, such as the type of housing actually in demand and the kind of construction permitted in the less populated community. If, for example, a semi-rural area has a strong commitment to restricting residential land use to single family homes on one-acre parcels, it is unlikely that a neighboring city's need for more inexpensive multi-family dwellings will lead to development of the less urbanized town. It may also be of concern to the local agency that the applicant is a developer who has already built five other housing developments on similar sites which he purchased and subdivided rather than a cattle rancher who has been grazing his stock on the property for 15 years. An applicant's past conduct may not be conclusive, but depending upon the specific circumstances, such past behavior might certainly be grounds for further inquiry before the agency could state with certainty that future projects were improbable.

Although CEQA has guidelines to aid in its implementation and clarification, the guidelines fail to address such questions. As a result, local agencies are left without guidance on how they are to comply with the Act where probable future projects are concerned.

II. CEQA: ITS STRUCTURE AND APPLICATION

The provisions of the California Environmental Quality
Act apply to all discretionary projects approved or carried out by public agencies. As the Act itself specifies, "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 while providing a decent home and satisfying living environment for every Californian." CEQA attempts to achieve this goal by employing a three-pronged system of statutory provisions, state guidelines and local regulations.

In considering the merits of any given project, the Act requires a local agency to first determine whether the project is likely to have a significant effect on the environment. If the agency finds that the project will have no such effect, it must file a "negative declaration" describing how it reached this conclusion. If, however, it appears that a project may exert a significant effect on the environment, the agency must then prepare an environmental impact report (EIR) concerning the proposal. The EIR is a detailed informational document setting forth the immediate and long-term environmental effects of the project, the measures available to mitigate significant environmental effects, and the possible alternatives to the proposed project.

To aid local agencies in their project evaluations, CEQA provides for the creation of state guidelines by the Office of Planning and Research. These guidelines now exist as part of the California Administrative Code and provide "criteria for public agencies to follow in determining whether or not a proposed project may have a ‘significant effect on the environment.’" CEQA further requires public agencies to formally adopt "objectives, criteria, and procedures for the evaluation

12. Id. § 21000(g) (West Supp. 1980).
of projects and the preparation of environmental impact reports and negative declarations" which are consistent with the Act and the state guidelines.\footnote{21. \textit{Cal. Pub. Res. Code} § 21082 (West 1977).}

The real heart of the Act lies in its definition of "significant effect" which, if found, requires preparation of an EIR. CEQA requires an agency to find that a project may have a significant effect on the environment if any one of three conditions is present:

- (a) A proposed project has the potential to degrade the quality of the environment, curtail the range of the environment, or to achieve short-term, to the disadvantage of long-term, environmental goals.
- (b) The possible effects of a project are individually limited but cumulatively considerable. . . .
- (c) The environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly.\footnote{22. \textit{Id.} § 21083(b) (emphasis added).}

It is the second condition from which the issue of "probable future projects" arises.

In an attempt to clarify what "cumulatively considerable" meant, the legislature provided the following definition: "'[c]umulatively considerable' means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects."\footnote{23. \textit{14 Cal. Ad. Code} § 1685.11 (West 1980). \textit{See also} § 1686.2(c) which makes the finding of "cumulative effect" a "mandatory finding of significance" automatically triggering the EIR requirement.} The duty of local agencies to examine proposed projects in future as well as present contexts seems clear enough on the face of the statute. State guidelines written to implement this section of CEQA only reinforce such an interpretation: "Where an individual project is a necessary precedent for action on a larger project . . . with significant environmental effect, an EIR must address itself to the scope of the larger project."\footnote{24. 14 \textit{Cal. Ad. Code} § 1685.11 (West 1980). \textit{See also} § 1686.2(c) which makes the finding of "cumulative effect" a "mandatory finding of significance" automatically triggering the EIR requirement.} Although this language seems clear, there remains considerable doubt as to when the cumulative potential of probable future projects constitutes a "significant effect" on the environment requiring preparation of an EIR. Thus, in the hypothetical outlined above it is arguable that
the planning commission erred when it approved the tentative subdivision map without considering probable future projects or preparing an EIR. On the other hand, it is also reasonable to argue that even if considered, the cumulative environmental effects of unspecified future projects and a subdivision map approval are far from "significant" and thus, no EIR should be required at that early stage of development.

III. Litigation Under CEQA Relating to Probable Future Effects

A representative sampling of opinions from the California courts reveals the same lack of consensus about CEQA as exists among those who must follow its precepts. Ever since Friends of Mammoth,25 with its emphasis on affording maximum protection to the environment, state courts have wrestled with the meaning of CEQA’s mandate that a project’s cumulative effects, including probable future projects, be examined prior to and during the EIR process.

Two years after Friends of Mammoth, No Oil, Inc. v. City of Los Angeles (No Oil)26 reached the California Supreme Court. While not dealing exclusively with cumulative effects, No Oil bore significantly on the issue by setting a low threshold to trigger the EIR requirement. The question in No Oil was whether or not the drilling of several test wells by Occidental Petroleum required preparation of an EIR.27 Plaintiffs initially tried to force consideration of the project’s cumulative impacts by claiming that probable future projects "encompassed commercial oil production in Pacific Palisades."28 The trial court declined to take so broad a view, however, and confined its attention to drilling of the test wells.29

Arguments on both sides offered a perfect illustration of the tension created by the "probable future projects" requirement. Plaintiffs stressed that it would be a waste of money to drill test wells unless commercial production was to follow and that environmental effects of such commercial development were clearly relevant at this stage, since a finding of ad-

27. Id. at 73, 529 P.2d at 69, 118 Cal. Rptr. at 37.
28. Id. at 77, 529 P.2d at 71, 118 Cal. Rptr. at 39.
29. Id.
verse impacts might convince the local agency to disapprove the test project. Plaintiffs argued that by limiting its inquiry to the mere drilling of a few test wells, the local agency was defeating the purposes of CEQA.

The defendants, on the other hand, argued that they needed geologic information from the test wells before they could prepare an accurate EIR on the environmental effects of commercial oil production. They looked to the federal courts for support in insisting that preparation of an EIR without reliable information on which to base it would "tend toward uninformative generalities."

Since neither side in No Oil had briefed this question thoroughly the court declined to decide the issue; however, it did offer a terse summation of the dilemma. Borrowing language from Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission (SIPI), the court observed: "[w]e are pulled in two directions. Statements must be written late enough in the development process to contain meaningful information, but they must be written early enough so that whatever information is contained can practically serve as an input into the decision making process." This is the very dilemma posed in the previously discussed hypothetical subdivision. On the one hand, the planning commission could see no value in addressing the impact of future development at the subdivision stage; in the absence of a formal building proposal it felt that such a focus would require the agency to do a great deal of guesswork. On the other hand, those arguing for immediate consideration of future development might have felt that such a study could provide information pertinent to planning a subdivision that would cause the fewest adverse environmental effects.

Although the court in No Oil declined to address the issue of probable future projects, its decision did provide ammunition for those advocating strict construction of CEQA's cumulative effects requirement by broadening the circum-

30. Id. at 77 n.5, 529 P.2d at 71-72 n.5, 118 Cal. Rptr. at 39-40 n.5.
31. Id.
32. Id.
34. 13 Cal. 3d at 77 n.5, 529 P.2d at 71-72 n.5, 118 Cal. Rptr. at 39-40 n.5.
35. Id.
stances under which an EIR must be prepared. The trial court in *No Oil* had interpreted CEQA's language to mean that agencies need only prepare EIRs when "there is a reasonable possibility that the project will have a momentous or important effect of a permanent or long enduring nature." The California Supreme Court disagreed with this test, choosing instead to apply a test articulated in *County of Inyo v. Yorty*. That decision held that an agency must prepare an EIR whenever it encounters some substantial evidence that the project "may have" a significant adverse effect on the environment. To employ a more restrictive test, said the court in *No Oil*, would be to afford less protection to the environment than the Act intends.

The court went on to note that preparing an EIR in close cases has a special value because the EIR aids in informing the public about a project's environmental consequences. The very existence of an EIR can reassure citizens that their agencies have in fact considered the impact that a project may have on the environment.

*No Oil* sets a very low threshold to trigger the EIR requirement. If CEQA's purpose is, as the court suggests, to provide maximum protection to the environment, to supply the public with information about a project's potential effects, and to help insure that public officials make thoughtful, well-informed decisions, then consideration of probable future projects seems essential. Since there are situations where present projects obviously will affect or be affected by future ones, agencies cannot ignore future projects and still provide the kind of environmental protection intended by the Act.

Not all courts, however, have accepted the strongly protective stance taken in *Friends of Mammoth* and *No Oil*; this is particularly true where probable future projects were concerned. In a number of decisions, including the often cited *Hixon v. County of Los Angeles*, *Plan for Arcadia, Inc. v.*

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37. 13 Cal. 3d at 82, 529 P.2d at 75, 118 Cal. Rptr. at 43.
39. Id. at 814, 108 Cal. Rptr. at 390. See id. at 809, 108 Cal. Rptr. at 387 which indicates that the presence of substantial evidence that the project "may have" a significant . . . effect environmentally is sufficient to trigger the EIR requirement.
40. 13 Cal. 3d at 84-85, 529 P.2d at 77, 118 Cal. Rptr. at 45.
41. Id. at 86, 529 P.2d at 78, 118 Cal. Rptr. at 46.
City Council of Arcadia, 44 and Natural Resources Council v. California Coastal Zone Conservation Commission, 48 the appellate courts have declined to look at the cumulative impact of a proposed project in combination with probable future projects. The California Supreme Court did not have occasion to re-examine the issue until 1975 when it heard Bozung v. Local Agency Formation Commission of Ventura County, 48 which is reminiscent of the hypothetical subdivision and subsequent development.

Plaintiffs in Bozung challenged a local agency’s approval of a plan annexing a tract of agricultural property to the City of Camarillo for purposes of residential, commercial and recreational development. The question arose as to whether the local agency should have prepared an EIR on the annexation because it was a “project” “which may have a significant effect on the environment.” 47 Relying heavily on language from Friends of Mammoth which referred to projects “culminating in physical changes to the environment,” 48 the Bozung majority found that this particular annexation proposal definitely

county street improvement program that called for removing large numbers of trees. The tree cutting had occurred in several distinct locations. Each location was dealt with separately in the county’s environmental review and it was determined that there was no need for an EIR. The court upheld this exercise of agency discretion and declined plaintiffs’ request for an EIR covering all future tree removal within the county.

44. Arcadia, 42 Cal. App. 3d 712, 117 Cal. Rptr. 96 (1974) considered the cumulative effects of several related proposals—a shopping center, parking lot, and street widening project. Although the court agreed that all three should be viewed as one project in evaluating their environmental impact, the proposals were exempt from CEQA by reason of the Act’s ministerial and validation provisions. Since the 72 acre shopping center was part of a 400 acre parcel, petitioners argued that an EIR should be prepared covering projected development of the entire 400 acres. The court, however, held that no EIR would be needed until someone attempted to develop the as yet unimproved portion of the 400 acre tract.

45. In Natural Resources Defense Council v. California Coastal Zone Conservation Comm’n, 57 Cal. App. 3d 76, 129 Cal. Rptr. 57 (1976), plaintiffs challenged the Coastal Commission’s failure to prepare an EIR before issuing permits for construction of 15 homes. The 15 homes were located in an area in which 1,550 building lots had been sold and on which 340 homes had already been built. The court held that the Commission need only consider the impact of building 15 homes and not the potential impact of a full build-out. Therefore, no EIR was required.

46. 13 Cal. 3d 263, 529 P.2d 1017, 118 Cal. Rptr. 249 (1975).

47. See CAL. PUB. RES. CODE § 21151 (West 1977) which requires all local agencies to prepare and certify the completion of an environmental impact report on any project they intend to carry out or approve “which may have a significant impact on the environment.”

48. 8 Cal. 3d at 265, 502 P.2d at 1061, 104 Cal. Rptr. at 773.
The cumulative effects of this project appeared to weigh very heavily in the court's decision. The majority pointed to the fact that Kaiser Aetna, the real party in interest, wished to subdivide the land, a project "destined to go nowhere" without prior annexation. Once subdivision had taken place, recreational, commercial and residential development already in the planning stages could go forward, resulting in certain urban growth. Therefore, the court concluded that it "seems idle to argue that the particular project here involved may not culminate in physical change to the environment."

The Bozung court rejected the defendant's argument that an EIR at the annexation stage would be wasteful because another EIR would have to be prepared before any subsequent rezoning proposal. In reaching its decision, the court noted that a change in land use was definitely anticipated, and that planning and conferences with local agencies regarding these changes had already begun. It is CEQA's goal, said the court, to provide information on the environmental consequences of a project at the earliest possible stage; this purpose is clearly expressed in the state guidelines and must be considered of paramount importance.

Bozung is significant both for what it does and for what it does not do. It does articulate, more clearly than any case before it, the affirmative obligation that CEQA imposes on agencies to consider probable future projects along with present proposals in deciding whether or not there may be some significant cumulative effect on the environment. It does not, however, provide any guidance as to how agencies may fulfill this obligation. The court takes the same ad hoc approach here that it has used in the past. There is no effort to design a test which agencies might employ in deciding whether or not the cumulative effects of present and future projects are significant enough to require an EIR. Neither here nor in any other decision has the court attempted to define what sort of

49. 13 Cal. 3d at 279-81, 529 P.2d at 1027-29, 118 Cal. Rptr. at 259-61.
50. Id. at 281, 529 P.2d at 1029, 118 Cal. Rptr. at 261.
51. Id.
52. See, e.g., 13 Cal.3d at 281 n.24, 529 P.2d at 1029 n.24, 118 Cal. Rptr. at 261 n.24, where the court cites specific details regarding the way in which annexation would ultimately affect population density and vehicle emissions.
53. Id. at 281, 529 P.2d at 1029, 118 Cal. Rptr. at 261.
54. Id. at 282, 529 P.2d at 1038, 118 Cal. Rptr. at 262.
cumulative impacts an EIR should address. Agencies do not know how far their predictions must range either in terms of time or geography. The result, of course, is that the same issues arise again and again.

As recently as 1979 the appellate court heard Whitman v. Board of Supervisors, which challenged the sufficiency of an EIR for failing to consider fully the cumulative effects of drilling an exploratory well in Ventura County.\(^5\) The Board of Supervisors raised the usual arguments in its defense: that the “projection of possible projects would be based on speculation” and that the “[g]uidelines do not require a cumulative analysis of possible projects.”\(^5\) In response, the court pointed to specific language in section 15142 of the state guidelines which requires an EIR to include “both existent and planned” related projects in their cumulative impacts analysis.\(^7\) The Board had ignored this requirement, making no effort to inquire of companies already drilling in the area about their plans for expansion. Nor did it consult with other public agencies having jurisdiction over resources that might be affected by the project.\(^8\)

The court criticized the EIR for its total lack of specificity and detail, finding the cumulative impact discussion “utterly devoid of any reasoned analysis. . . .”\(^9\) While there are limits to the amount of information an EIR can feasibly provide, an impact report containing nothing but generalities unsupported by data or scientific authority has little value.\(^6\)

Whitman illustrates the gap remaining between CEQA’s intent and its implementation. Courts unanimously interpret the statute as mandating maximum protection for the environment. Yet how is such protection to be won? If agencies do not look beyond the strict geographic confines of a proposed project, if government officials are unwilling to include in their calculations the impact which future projects may exert on the environment, then CEQA truly has little force.

The focus on cumulative effects is essential to the purpose of CEQA. Agencies assessing projects may not close their eyes to this requirement. The message is clear from the courts

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56. Id. at 410, 151 Cal. Rptr. at 873.
57. Id.
58. Id. at 412, 151 Cal. Rptr. at 874-75.
59. Id. at 411, 151 Cal. Rptr. at 874.
60. See id.
and legislature alike. But agencies responsible for carrying out the provisions of CEQA have sent back an equally clear message that this requirement is too difficult to fulfill in the absence of some uniform standards. The extensive litigation under CEQA proves that the ad hoc approach has not worked. On the contrary, it has created a confusing array of contradictory decisions providing ammunition for those who would like to avoid the mandate of CEQA, and no guidance at all for those who sincerely wish to comply.

Where, then, are agencies to find uniform criteria for use in environmental decision-making? CEQA was closely modeled after the National Environmental Policy Act of 1969 (NEPA). California courts have frequently looked to federal analyses under NEPA when attempting to interpret CEQA provisions. Environmental litigation in California has followed a path similar in many respects to that of the federal courts in interpreting their own environmental legislation. Yet even at the federal level, agencies and courts have struggled to determine the role future projects should play in the environmental assessment of current proposals.

IV. THE FEDERAL EXPERIENCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT

Unlike California's statute, NEPA does not refer directly to the "cumulative effects" of a project. However, consideration of these effects has been frequently read into NEPA's requirement that detailed statements be prepared in "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." Early in NEPA's history it became clear that this section was too vague to guide agencies in determining the scope required of their Environmental Impact Statements (EIS). In an attempt to remedy this problem, the Council of Environmental Quality (CEQ) drew up guidelines to use in implementing the EIS requirement. Unfortunately, not all agencies adopted these standards. As a result, the


64. 40 C.F.R. §§ 1500.1-.6 (1980).
courts inherited the task of trying to develop some uniform criteria by which to determine the proper scope of an EIS.\textsuperscript{65}

Federal courts have wrestled with many of the same issues under NEPA that the California judiciary has faced under CEQA, particularly where the cumulative environmental effects of present and future projects are concerned.\textsuperscript{66} The federal approach, however, has been a bit different from California's. Federal courts sometimes take a very active role in attempting to fill in the gaps left by the statute.\textsuperscript{67} These decisions also reveal a sharp difference of opinion as to whether such an active judicial role is appropriate.\textsuperscript{68}

One of the federal court's first efforts to deal with the issue of probable future projects under NEPA appeared in Scientist's Institute for Public Information v. Atomic Energy Commission (SIPI).\textsuperscript{69} That case revolved around the federal government's program to develop a Liquid Metal Fast Breeder Reactor. The program encompassed a number of related research projects including construction of test facilities, demonstration plants, and ultimately, construction of commercial scale breeder reactor electrical power plants assisted by government aid. In an effort to comply with NEPA, the Atomic Energy Commission (AEC) prepared impact statements for one test facility and for the first demonstration plant.\textsuperscript{70} Appellants, however, claimed that since the program involved major federal action affecting the quality of the environment, section 102(c) of NEPA\textsuperscript{71} required an EIS directed toward the total research and development program.\textsuperscript{72} The Commission argued that an EIS would be neither feasible nor meaningful at that stage due to "[t]he remote and speculative nature of the project," and further argued that any long-range analysis would require the AEC to engage in fanciful guessing.

\textsuperscript{65} For an historical analysis of the way in which the EIS requirement developed and the policy questions remaining, see The Scope of the Program Requirement: The Need for a Coherent Judicial Approach, 30 Stan. L. Rev. 767 (1978).

\textsuperscript{66} See, e.g., Kleppe v. Sierra Club, 427 U.S. 390 (1976); City of Davis v. Coleman, 521 F.2d 661 (9th Cir. 1975); Trout Unlimited v. Morton, 509 F.2d 1276 (9th Cir. 1974); Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n, 481 F.2d 1079 (D.C. Cir. 1973).


\textsuperscript{68} See generally id. But see Kleppe v. Sierra Club, 427 U.S. at 406, 416.

\textsuperscript{69} 481 F.2d 1079 (D.C. Cir. 1973).

\textsuperscript{70} Id. at 1085.

\textsuperscript{71} 42 U.S.C. § 4332(2)(C).

\textsuperscript{72} See 481 F.2d at 1085.
games.\textsuperscript{73}

In rejecting this argument, the court strongly supported broad environmental impact statements and listed a number of benefits that might follow.

Individual actions that are related either geographically or as logical parts in a chain of contemplated actions may be more appropriately evaluated in a single, program statement. Such a statement also appears appropriate in connection with the development of a new program that contemplates a number of subsequent actions. . . . [T]he program statement has a number of advantages. It provides an occasion for a more exhausting consideration of effects and alternatives than would be practicable in a statement on an individual action. It ensures consideration of cumulative impacts that might be slighted in a case-by-case analysis. And it avoids duplicative reconsideration of basic policy questions.\textsuperscript{74}

While recognizing that no agency "can foresee the unforeseeable,"\textsuperscript{75} the court found some degree of forecasting via impact statements to be a fair and reasonable requirement.\textsuperscript{76}

Members of the court grappled with the recurrent problem of when the EIS must be prepared. The documents had to be prepared late enough to contain meaningful information, yet early enough to aid in decision-making.\textsuperscript{77} In an effort to solve this problem the court suggested four questions which might guide agencies in determining whether the time was ripe for an EIS:

How likely is the technology to prove commercially feasible, and how soon will that occur? To what extent is meaningful information presently available on the effects of application of the technology and of alternatives and their effects? To what extent are irretrievable commitments being made and options precluded as the development program progresses? How severe will be the environmental effects if the technology does prove commercially feasible?\textsuperscript{78}

\textsuperscript{73} Id. at 1086.
\textsuperscript{74} Id. at 1087-88 (citing Council on Envt'l Quality Memo, Agencies on Procedures for Improving Envt'l Impact Statements, \textit{reprinted in} 3 Envir. Rep. (BNA) 82, 87).
\textsuperscript{75} Id. at 1092.
\textsuperscript{76} Id.
\textsuperscript{77} Id. at 1094.
\textsuperscript{78} Id.
Recognizing that the balance of competing concerns may shift over time, the court recommended that agencies create some formal system to periodically reevaluate EIS timing where long-term projects are involved.\(^7\) The court also suggested that agencies be required to articulate their reasons for deciding not to prepare an EIS at a particular time. Such a statement would prove that an agency has adequately considered the problem, and would provide a record that the court could use if called upon to review the agency decision.\(^8\)

Testing the breeder reactor program against the stated guidelines, the court concluded that the program would have a number of cumulative effects on the environment, that the nature of these effects was far from speculative, and that national concern over health hazards to the public made thorough environmental review of the program essential at this stage.\(^9\)

\textit{SIPI} was notable for its comprehensive treatment of cumulative impacts and consideration of probable future projects as a part of NEPA's environmental review process. It identified the problems inherent in implementation and pointed out the importance of examining these impacts. Further, the decision attempted to offer guidelines, which agencies could use to determine appropriate timing for environmental assessments, and it provided an illustration of how these guidelines might be applied in a specific situation.

One might expect that such a decision, coming early in the life of NEPA, would diminish future controversy regarding the intended scope of environmental review. This was not the case. In 1975 Justice Powell delivered the U.S. Supreme Court's majority opinion in \textit{Kleppe v. Sierra Club},\(^2\) which overruled the \textit{SIPI} guidelines and again called NEPA requirements into question.

The issue raised in \textit{Kleppe} was whether or not the federal government must prepare a comprehensive EIS concerning its programs for developing coal resources in the entire northern Great Plains region.\(^3\) Plaintiffs felt that EISs which focused on strictly local effects of individual projects failed to satisfy the requirements of NEPA, because these separate projects,

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79. \textit{Id.}
80. \textit{Id.} at 1095-96.
81. \textit{Id.} at 1096-98.
82. 427 U.S. 390 (1975).
83. \textit{Id.} at 395.
when taken together, constituted major federal action. The Sierra Club argued that section 102(2)(c) called for examination of the cumulative effects of all projects existing or anticipated.

The Supreme Court, however, found all the proposals for federal action to be local or national in scope rather than regional. Since there had been no regional report or recommendation made, the Court ruled that no EIS was required under the language of NEPA. According to the majority, the court of appeals had erred in applying a four-part balancing test similar to the one used in *SIP* to determine the proper time for an EIS.

A court has no authority to depart from the statutory language and, by a balancing of court-devised factors, determine a point during the germination process of a potential proposal at which an impact statement should be prepared. Such an assertion of judicial authority would leave the agencies uncertain as to their procedural duties under NEPA, would invite judicial involvement in the day-to-day decision-making process of the agencies, and would invite litigation.

Justice Marshall, concurring in part and dissenting in part, objected strongly to the limitations that the majority placed on the ability of federal courts to carry out the intent of NEPA. Compliance with the statute, he pointed out, often means preparing impact statements at an early stage. Thus, situations will arise where an agency that has not yet begun this environmental review will be in violation of the law. Justice Marshall saw the four-part test as a useful tool for determining when judicial intervention might be appropriate. He

86. 427 U.S. at 399.
87. Sierra Club v. Morton, 514 F.2d 856, 880 (D.C. Cir. 1975). The tests employed by the appellate court were:
   How likely is the program to come to fruition and how soon will that occur? To what extent is meaningful information presently available on the effects of implementation of the program, and of alternatives and their effects? To what extent are irretrievable commitments being made and options precluded as refinement of proposal progresses? How severe will be the environmental effects if the program is implemented?
88. 427 U.S. at 406.
89. *Id.* at 416.
90. *Id.* at 418-20.
viewed the majority's fears of undue judicial intervention with skepticism, and expressed doubts that the lower court's test would result in preparation of many unnecessary impact statements. 91

Although federal courts seem to agree on the need for examining the cumulative effects of present and future projects under NEPA, SIPI and Kleppe illustrate the lack of unanimity as to the scope and timing of such examination. Those cases also reveal how widely courts differ as to what their own role should be in implementing the Act. The extent to which Kleppe overruled SIPI remains unclear. 92

California will have to make its own decisions about whether it is the job of the courts or the legislature to define the scope of environmental review. The federal cases are helpful, however, in illustrating the inevitable difficulties that result from legislation with ambitious goals and ambiguous requirements. Like NEPA, CEQA is aimed at protecting the environment for generations to come. It therefore imposes a future-oriented outlook upon the agencies carrying out its provisions. The statute demands of these agencies an ability to predict how the cumulative interaction of present and future projects will effect the environment. The extensive litigation arising under both state and federal statutes suggests that agencies are finding this requirement unduly burdensome and confusing. Without clearer guidelines there is little indication that California can force agencies to maintain the forward-looking thrust so essential to effective environmental protection.

V. A SUGGESTED APPROACH TO IMPLEMENTING THE "PROBABLE FUTURE PROJECTS" REQUIREMENT UNDER CEQA

Assuming that present state guidelines do not adequately prepare agencies to deal with probable future projects, the question arises as to whether it is really worthwhile to try to create some sort of uniform approach toward this subject. Some may believe that it is more realistic to strike the requirement from the statute than to struggle with the practical administrative difficulties of implementing it. To be sure, examination of probable future projects poses special problems. Such assessments often call for extensive research. Local

91. Id. at 421-22.
92. See id. at 406.
agencies may find themselves ill-equipped to collect and analyze sophisticated data required for an informed judgment. Furthermore, resulting delays and expenses are bound to frustrate those awaiting approval of their proposals. Public officials may be leery of onerous requirements that might discourage entrepreneurs from carrying out projects that would bring economic benefits to their particular city or county.

On the other hand, communities derive many benefits from taking a far-sighted approach to environmental planning. First, by putting potential cumulative effects of present and future projects in the public eye, local agencies help to keep the public informed and encourage active citizen participation at an early stage in the planning process. Secondly, those proposing projects may find that the need to examine future as well as present plans actually protects the viability of their projects by offering an early opportunity to mitigate any adverse impacts. A third and important advantage of forcing agencies to look at probable future projects is that it prevents officials from avoiding CEQA's EIR requirement by chopping up one major project into a number of minor ones, none of which would significantly alter the environment by itself. Finally, the future projects provision, by encouraging a broad perspective, helps to preserve the objectivity of local officials whose desire to approve particular projects may be influenced by parochial interests.

Much as we may want to preserve these benefits, consid-
eration of probable future projects always raises questions about feasibility. Is it actually possible to provide local agencies with guidelines that address the issue of probable future projects without forcing them to engage in useless speculation? “Probable” is a term open to many interpretations, and some future projects are obviously more probable than others. Nevertheless, it seems possible to construct a framework for examining probable future projects that is broad enough to allow agency flexibility, yet sufficiently structured to impose a clear and uniform duty on every governmental body involved in proposing or approving projects under CEQA. Such a framework would rest on one key premise—that agencies have an affirmative duty to inquire about the existence of probable future projects. While such an obligation may appear obvious, CEQA does not spell out such a duty where probable future projects have not yet been formally proposed. Under such circumstances local agencies, much like the planning commission in the hypothetical subdivision example, may choose to limit the scope of their inquiry to the project currently before them. The lack of a specific requirement to investigate probable future projects allows local agencies to hide behind a lack of information and to avoid preparation of EIRs in situations where such documents would clearly be useful. An affirmative duty to inquire on the part of every permitting agency would prevent this sort of avoidance.

The inquiry should consist of two phases. The first phase should include future project plans of the person or entity proposing the project currently before the local agency. The second phase should include an independent evaluation conducted by the agency to determine the reasonableness of the proponent’s reply. If a proposing person or entity affirms an intent to pursue future projects related to the present proposal, then the agency’s duty is clear. It must consider the effect of the present project together with intended future projects to see if they might exert some significant cumulative effect on the environment. 95

If, on the other hand, the project proponent declares that he plans no future projects, the agency must do more than accept that statement at face value. The agency must evaluate the reasonableness of this declaration by first looking at whether the project as submitted has some independent pur-

pose. If the significance of the project is clear, then the inquiry terminates. If, however, the present project appears useless without some further activity, then the agency should require a written explanation from the proponent stating the purpose of the project and why there will be no probable future project to follow. It was this sort of situation which prompted the plaintiffs in _No Oil_ to press for further environmental inquiry. In that case the permitting agency refused to consider the environmental effect of eventual commercial oil drilling, even though there was no purpose to drilling test wells unless commercial production might follow.

In evaluating a project proponent’s statement that he anticipates no future projects, an agency should look at the circumstances surrounding the present project. It may happen that, although the proponent is acting in good faith, conditions are such that he may change his mind or that future projects are likely to follow despite his beliefs. Depending on the nature of the project, an agency might examine such factors as population trends, land-use patterns, and special needs of the immediate and surrounding communities. For example, an owner might apply for permission to subdivide his land, fully intending to continue its present use as grazing land. But if zoning laws permit the land to be developed and the area’s population is growing rapidly, if housing is scarce and this is the last large parcel of undeveloped land within five miles, an agency might well find that future development is highly probable. It must then take that probable future development into consideration in determining the environmental effect of the proposed subdivision.

This scheme offers one method for enforcing CEQA’s mandate to consider probable future projects in the environmental review process. It has the virtue of imposing a clear threshold duty of inquiry on all local agencies. Under this scheme, those proposing projects, as well as the agencies approving them, will be encouraged to do early planning with environmental restrictions in mind as required by CEQA and the state guidelines. At the same time, the evaluation process suggested here, leaves agencies free to arrive at their own assessments of probability based on analysis of existing data.

96. 13 Cal. 3d 68, 529 P.2d 60, 118 Cal. Rptr. 32 (1974).
97. Id. at 77 n.5, 529 P.2d at 71-72 n.5, 118 Cal. Rptr. at 39-40 n.5.
If the likelihood of some future project seems too speculative, an agency has the discretion to ignore it and narrow its focus to the project presently proposed.

Although there are methods that might adequately serve to guide local agencies in their consideration of probable future projects, neither the courts nor the California Legislature has addressed the need for such guidance. There seems little question that either one or both must assume this responsibility if CEQA is to afford the protection that its framers intended.

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