COORDINATION OF STATE ENVIRONMENTAL LAWS AND THE NATIONAL ENVIRONMENTAL POLICY ACT

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I

INTRODUCTION

Following the enactment of the National Environmental Policy Act on January 1, 1970, efforts were commenced by many states to enact environmental statutes of their own, with California's Environmental Quality Act being one of the first.[1] California's act became law some eight months after the enactment of NEPA. Efforts to enact environmental legislation has continued and is continuing throughout the various states. In my remarks today, I will mention briefly the status of environmental legislation in other states, and will share with you some of the experiences California has had with its environmental act and the problems we have had in coordinating it with NEPA. I will also touch upon the "California Coastal Zone Conservation Act of 1972", which became law by vote of the people through California's initiative process.[2]

At the present time, approximately twenty states in addition to California have adopted some type of environmental legislation.[3] In most of these, the state environmental legislation is quite different from NEPA. The California Environmental Quality Act (CEQA), on the other hand, has been described by the California Supreme Court, in Mammoth v. Mono County as having an "uncanny" similarity to NEPA.[4] This "uncanny" similarity to NEPA is explained quite simply by the fact that our legislators literally copied portions of the National Environmental Policy Act, but as all legislators are wont to do, they did change certain features of the act. The similarity between the two acts has been of some assistance in melding them. However, the similarity has also caused some difficulties.

II

STATE ENVIRONMENTAL ACTS

A. THE PRESENT STATUS OF ENVIRONMENTAL REQUIREMENTS IN THE VARIOUS STATES

An increasing number of states have adopted some type of environmental review requirement patterned after NEPA in the four years since it became law. A survey conducted by the Center for California Public Affairs discloses that twenty states have adopted some form of review by environmental impact statement.[5] These are listed and summarized in a chart contained in this paper as Exhibit A.

The environmental impact statement requirement is imposed by statute in thirteen of the twenty states. Most of these statutes limit their application to state projects or activities only. Some also apply to local agencies, and a few apply to private activities which are subject to governmental approval. There are statutes which are limited geographically (such as Delaware's--limited to the coastal zone) and by type of project (such as Nevada's--limited to utility plants). And one state (Virginia) has excluded highways and roads from the application of its statute.

Some five states (Arizona, Connecticut, Hawaii, Michigan, and Texas) have adopted environmental impact statement requirements by executive order. And two other states (Georgia and Nebraska) have environmental impact statement requirements limited specifically to highway projects.

All of the twenty states have followed the example of NEPA in providing for review by means of an environmental impact statement. About half of them require their environmental impact statements to consider at least the five elements set forth in NEPA: the rest of the states require consideration of some, but not all, of NEPA's elements.

B. MODEL ENVIRONMENTAL STATUTE

The second National Symposium on State Environmental Legislation meeting in April 1973, under the auspices of the Council of State Government, Council on Environmental Quality, Environmental Protection Agency, and the Department of the Interior, developed a "Suggested State Environmental Policy Act".[6] This statute, ostensibly modeled on the National Environmental Policy Act of 1969 and the California Environmental Quality Act of 1970, will undoubtedly be of assistance to legislators and others engaged in the process of drafting state environmental laws.

An examination of the model statute in light of California's experience indicates that the model statute contains certain shortcomings. For example, the model act is ambiguous in its direction as to the balance between protection and enhancement of the environment with social and economic consideration, at one point indicating that they "shall" be considered and at another point indicating that they "may" be considered.[7] The model act also contains no statute of limitations, though the drafters acknowledge in a footnote that such limitation provision might be appropriate.

As anyone experienced in environmental litigation well knows, the lack of a statute of limitations in the National Environmental Policy Act has been a continuing source of irritation. Courts have been very reluctant to bar plaintiffs relief under NEPA on the equitable doctrine of laches, even where suit is filed at a very late stage in the project.

The California statute, which like the model applies to many private projects as well as to actions of public agencies, does contain such a statute of limitations provision. Without such a provision

private contractors, many of whom are not able to sustain a long period of uncertainty when threatened by loss of financing commitments, often are particularly vulnerable. Our experience in California with our relatively short (30 days) statute of limitations has clearly demonstrated its value in providing an early determination as to whether or not a particular project may go forward; and based on our experience, we believe that a clearly defined statute of limitations provision is essential. The other essential, if the limitations provision is to be workable, is to have some provision like California's requirement for the filing of a "Notice of Determination"[8] trigger the start of the limitation period.

It might be further noted that the model statute exempts from the application of its terms actions taken by an environmental protection agency. It is questionable whether such a broad statutory provision is advisable or likely to be upheld by the court, in view of the severe environmental effect that can be caused by the regulations of such an environmental protection agency.

It might also be pointed out that certain matters are dealt with within the model statute which might more appropriately be contained in guidelines adopted pursuant to the act.

With its limitations, the model act is nevertheless a good starting point if it is felt desirable that an environmental policy act be adopted.

III

THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

When the California Environmental Quality Act legislation was first introduced, it was intended to cover projects in the private

sector as well as public projects. However, as the legislation proceeded through the legislative process, the operative sections which applied the act to "private" projects were deleted and the operative sections were limited to public projects. In the course of this amendment process, however, the broadly stated policy of the legislation which included reference to private projects was not deleted.

In 1972, in the case of Friends of Mammoth v. Mono County,[9] the California Supreme Court, in a classic example of judicial legislation, seized upon the general legislative policy statements of the act to breathe life into the regulation of private projects under CEQA. The decision caused great furor in both the private sector and in the Legislature. As a result, CEQA was extensively amended in 1972.[10] The new act, while continuing the application of CEQA to private projects, also contained provisions clarifying and limiting[11] the new act. It provided a delineation of the scope of judicial review that could be applied to environmental impact reports,[12] and established a short statute of limitations for challenging projects under the act.[13] The act required that guidelines be adopted by the State Resources Agency within sixty days, and conforming guidelines by each of the other State and local agencies were to be promulgated sixty days thereafter. Under the 1972 amendments and the guidelines promulgated thereunder, the significant features of the California environmental impact process may be summarized as follows:

A. ENVIRONMENTAL STUDY

The environmental study is the first environmental assessment that a project receives, and is a requirement provided by the guidelines adopted pursuant to CEQA.[14]

At this beginning stage, the public agency evaluates its proposed project or activity to determine if there is a possibility that the project or activity may have a significant effect on the environment. In this early assessment, the expected and potential environmental impacts of the project or action are preliminarily evaluated and alternatives are considered. The purpose of this study is to determine if a significant impact is anticipated which would necessitate the preparation of an environmental impact report.

B. CATEGORICAL EXEMPTION

The categorical exemption, which is a classification peculiar to CEQA, was created to simplify procedures relating to recurring and similar projects.[15] This category establishes classes of projects which have been determined not to have a significant effect on the environment. The State guidelines set forth twelve basic classes which are exempt.[16] Each agency may establish its own list of exempted projects, subject to review and approval by the Office of Planning and Research (OPR) and the Resources Secretary. Similarly, a project termed "emergency" may also escape the lengthy EIR process. Once a project falls into one of these categories, it is exempt from the lengthy EIR preparation and review process. Thus, if a project is not categorically exempted or an emergency measure, and it will have a significant effect on the environment, the EIR process continues.

C. NEGATIVE DECLARATION

A negative declaration is a finding that the project or action will not have a significant impact on the environment. The declaration must describe the project as proposed and include a finding of no significant effect on the environment due to the

project.[17] This procedure was introduced via the State implementation guidelines and does not appear in the State statute.

D. ENVIRONMENTAL IMPACT REPORT

If the early environmental study indicated a possible significant effect on the environment, the process is commenced toward preparation of an environmental impact report. What the EIR must contain will be discussed later; however, the process of preparation and circulation through the various required State agencies is similar to the circulation of an EIS through the NEPA process, the main difference being that as soon as a draft EIR is completed an official notice referred to as "notice of completion" must be filed with the Secretary of the California Resources Agency. During the circulation process, comments are received and responded to in a manner similar to the NEPA process.

E. NOTICE OF DETERMINATION

After completion of the comment and review process, the EIR goes to the decision making body. They can adopt the report as the final EIR, and must consider it in conjunction with making their decision on whether to go forward with the project. After the decision on the project is made, the agency must file a Notice of Determination with the Resources Secretary, setting forth such approval, whether the project will have a significant effect on the environment, and whether an EIR was prepared pursuant to CEQA. This step in the State process has no equivalent in the Federal process, and the Notice of Determination is what triggers the 30-day statute of limitations in which challenges to the project must be brought.

IV

SUBSTANTIVE DIFFERENCES BETWEEN CEQA AND NEPA

There are at least four areas of concern where the State and Federal acts differ to a degree worth noting here. They are: (1) scope of the act, that is, what kind of activity triggers their application; (2) EIR/EIS content; (3) retroactivity, or treatment of ongoing projects; and (4) time limitations on challenging agency action for alleged environmental failures.

A. SCOPE

In many respects, the language used by the two acts is just similar enough to be confusing. CEQA clearly owes a debt to NEPA, but the fact that the State act is not identical to the Federal law creates some uncertainty as to CEQA's limits. In both cases, official action triggers the environmental reporting function, but the type of official action varies--at least in its statutory description.

The operative phrase in NEPA is "major federal action significantly affecting the quality of the human environment". From the extensive body of NEPA cases dealing with highways, it now seems clear that the presence of Federal funding in a project automatically subjects the project to the EIS requirements of NEPA.[18] In a recent California case, the court held that a State highway project which had received location approval was a "Federal-aid highway" for purposes of applying Federal statutes, even where the State was only holding open the option of securing Federal funds at a later date.[19] Extensive Federal litigation has attempted to fix the point at which an action becomes "Federal" and "major"; the standard has varied

widely, depending on the nature of the proposed action. In California, there have been far fewer cases to determine the parameters of CEQA. However, the leading case, Mammoth,[20] suggested that, in the future, Federal cases would be instructive in construing CEQA. An early Federal case construing CEQA has been of some help.[21]

Under CEQA, State agencies, boards, and commissions responsible for allocating funds for projects which may have a significant effect on the environment must prepare an environmental impact report.[22] Under CEQA, one of the critical stages is the authorization of funds for the project. Thus, where both CEQA and NEPA apply to a project, problems can arise as to the point in time when compliance is required under each act.

B. EIR/EIS CONTENT

In CEQA, as in NEPA, the prime vehicle chosen to implement the act is an informational document, variously called an environmental impact report (EIR) or an environmental impact statement (EIS). However, the elements to be considered and included in the California EIR differ somewhat from those required in the Federal EIS.

While the reader familiar with NEPA will recognize the five basic elements required by NEPA, a summary here will be useful for purposes of comparing the State act.

1. NEPA

Every recommendation or report on proposals for legislation and other "major federal action significantly affecting the quality of the human environment" must be accompanied by a detailed statement which discusses:

(a) The environmental impact of the proposed action;

(b) Any adverse environmental effects which cannot

be avoided should the proposal be implemented;

(c) Alternatives to the proposed action;

(d) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and

(e) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.[23]

2. CEQA

California's act requires a different set of factors for an EIR. Such reports are to include a detailed statement, discussing:

(a) The environmental impact of the proposed action;

(b) Any adverse environmental effects which cannot be avoided if the proposal is implemented;

(c) Mitigation measures proposed to minimize the impact;

(d) Alternatives to the proposed action;

(e) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity;

(f) Any irreversible changes which would be involved in the proposed action should it be implemented; and

(g) The growth-inducing impact of the proposed action.[24]

California's additional statutory requirements of growth-inducing impact and mitigation measures have analogues in NEPA and

its guidelines. In the NEPA EIS Guidelines, growth-inducing impact seems to be touched upon in the section on secondary or indirect consequences.[25] The NEPA Guidelines indicate that the effects of the proposed action on population and growth may be among the more significant secondary effects, and should be considered as part of the probable impact of the proposed action.

California's concern for mitigation measures is also mirrored to some extent in the Federal Guidelines.[26] In the discussion of alternatives to a proposed action, the decision maker must consider reasonable alternatives with lesser adverse environmental effects. This essentially requires consideration of how to mitigate a project's impact. Further, the Guidelines[27] specifically call for discussion of mitigation of avoidable adverse effects.

Recognizing these disparities, CEQA authorizes an EIS prepared for a project pursuant to NEPA to be used in lieu of an EIR, provided that such statement complies with CEQA and the State Guidelines.[28] Thus, proposed Federal projects in California which may have a significant effect on the environment and which the State officially comments upon must also include the "extra" factors required in CEQA.

C. RETROACTIVITY OR "PIPELINE" PROJECTS

A critical question arising out of CEQA and NEPA is the applicability of those acts to projects undertaken before passage of the bills. These "pipeline" or ongoing projects represent a large commitment of public resources and pose a serious problem since neither act directly speaks to the treatment of such projects. Some attention was paid to the issue in the State's implementing guidelines to CEQA.

The guidelines provide that projects under the jurisdiction of NEPA, held to be too far advanced by the CEQ guidelines to require an EIS, do not require an EIR under CEQA unless the responsible agency proposes a modification to the project plan such that a new significant effect on the environment could occur.[29] This complicated verbal clause effectively passes the initiative to the Federal Government's treatment of the issue unless the project was not originally subject to NEPA.

Where this is the case and the project is solely under CEQA, the project is exempted from the EIR process unless it: (1) may have a significant effect on the environment, and (2) a substantial portion of public funds allocated for the project have not been spent, and it is still feasible to modify the project in such a way as to mitigate against potentially adverse environmental effects, or to choose feasible alternatives to the project, including the alternative of "no project" or halting the project.

This, in substance, comes full circle and roughly parallels the standard used by a number of Federal courts in dealing with retroactivity. Unfortunately, no single formula for retroactivity has been agreed upon by the Federal cases. One case[30] widely cited recognized that at some stage of progress "the costs of altering or abandoning the project could so definitely outweigh whatever benefits that might accrue therefrom that it might no longer be 'possible' to change the project in accordance with Section 102."

Another Federal court in California has utilized a "balancing" test, keyed to design approval.[31] If design approval had not been obtained by January 1, 1970, an EIS is required; otherwise, the statement is to be prepared if "practicable". Four factors were

set forth to be used in weighing "practicability":

1. participation of the local community in the planning of the project;

2. the extent to which the State considered environmental factors;

3. the likely harm to the environment if the project is constructed as planned; and

4. the cost to the State of halting construction pending preparation and evaluation of an impact statement.

In Keith v. Volpe, cited in Sierra Club v. Volpe,[32] the Federal judge determined compliance was still "practicable" where various planning stages had yet to be completed. And in Sierra Club, the court noted:

> "... CEQA, although it does not by its own terms require compliance to the fullest extent possible, has been construed by at least one court as applying to ongoing highway projects which have not 'reached the stage of completion where the costs of abandoning or altering the proposed route would clearly outweigh the benefits therefrom. ..." (Emphasis added.)

Thus, by the exercise of the power to construe a State statute in the absence of any State court construction of the statute, the Federal courts have brought CEQA very close to NEPA on the question of retroactive applicability. The State's courts may still speak out, but at present it seems likely that compliance with both acts may be retroactively applied where "practicable".

In the sole reported California case dealing with ongoing projects, an intermediate appellate court found that several Federal cases applied NEPA to ongoing projects, and adopted the Arlington test as applicable to CEQA.[33]

D. STATUTE OF LIMITATIONS

Under CEQA, a party may bring an action for noncompliance under several code sections. Three basic approaches exist to "attack, review, set aside, void or annul" acts or decisions of a public agency; the period in which to challenge agency action varies accordingly. First, where an agency fails to determine whether the project will have a significant effect on the environment, or where a project is undertaken without any formal decision, suit must be filed within 180 days of commencement of the project.[34] This is a relatively long period for challenge.

Second, where an agency's determination of significant effect is challenged, the action must be brought within thirty days of the filing of Notice of Determination with the Resources Agency.[35] This notice is the assessment of the project's environmental effects and determines whether or not an EIR must be prepared.

The final CEQA cause of action mentioned in the Public Resources Code provides a 30-day period in which to challenge an EIR for noncompliance with CEQA.[36] The thirty-day period begins with the filing of the Notice of Determination.

Thus, the period of exposure to challenge for all but total disregard of the act is finite and fairly short--thirty days.

NEPA and the CEQ Guidelines are silent on this point. So far, the only restrictions on suits brought under NEPA has been the equitable defense of laches. The defense was successful in an unreported U.S. District Court opinion, Sullivan v. Volpe.[37] Thus, NEPA vulnerability is more imprecise than under CEQA, extending to the point at which a judge determines a delay in bringing suit by the plaintiff has been unreasonable and prejudicial to the defendant.

V

THE NEW COASTAL ZONE CONSERVATION ACT

California, in addition to having its own Environmental Policy Act, is doubly blessed in that it also has the California Coastal Zone Conservation Act, which was approved and adopted by the initiative process and became effective in November of 1972. Under the provisions of this act, permits are required from regional commissions established by the act for construction or development within the area 1,000 yards inland from the mean high tide line. The permit requirements apply to State and local governments, as well as private developers, and prohibit construction within the area of the act's jurisdiction unless a permit is obtained for such construction. The permit provision is not merely for the purpose of notice or review of the project, but provides that no permit may be issued unless the proposed construction or development is found to not have any substantial adverse environmental effect and is otherwise consistent with the objectives of the act.

The Coastal Zone Commission has established as a prerequisite to applying for a permit the requirement that all other necessary permits from local governments be granted or at least approved in concept. Regardless of whether a project is subject to local governmental approval, the Commission also requires, as a practical matter, that if the project requires the preparation of an environmental impact statement they have an opportunity to review such statement.

The primary problem, insofar as highway projects are concerned, is that the entire CEQA-NEPA environmental impact assessment process must be completed before the Commission will entertain an application for a permit for the project, with no assurance that such permit

will be granted. In addition, the time requirements of compliance with the Coastal Zone Commission procedures are added onto the lengthy process necessary to obtain environmental clearance under NEPA and CEQA.

VI

PROBLEMS ENCOUNTERED IN COMPLYING WITH BOTH CEQA AND NEPA

A. PROBLEMS IN THE ROUTE ADOPTION PROCESS

In order to understand some of the problems involved in having highway projects comply with both CEQA and NEPA, it will be necessary to describe briefly the highway route adoption process in California.

In California, the establishment and construction of the State Highway System is a legislative function. However, most of the details relating to route adoption have been delegated by the Legislature to a seven-man, nonsalaried lay commission.[38] The process operates in the following manner:

The Legislature by statute designates State highway routes, primarily by designation of the termini of the route with sometimes an indication as to what cities the routes should go through. For example, Route 5 was established by the Legislature, in part, as follows:

> "305. Route 5 is from the international boundary near Tijuana to the Oregon state line via National City, San Diego, Los Angeles, a point on Route 99 south of Bakersfield, the westerly side of the San Joaquin Valley, and via Yreka; ..."[39]

As can be seen by this type of designation, where a highway route some 1,200 miles in length is tied down to merely a few points along its route, considerable latitude remains with the Commission

as to the exact location of the State highway. By statute[40] and by its own procedures[41] the process by which highway routes are studied is fairly rigidly proscribed so as to provide the involvement of public agencies and the public itself in the route selection process. These procedures call for contacts with the local public entities at the time that route studies are initiated; it calls for careful coordination by the staff of the Department of Transportation and the staffs of the local entities concerned; it provides for public hearing processes so that the public can be made aware of the studies as they progress; and the process culminates, after a study of the various alternate routes, in a particular alternate being recommended by the State Highway Engineer and the Director of Transportation.

After receiving these recommendations, the California Highway Commission passes a Resolution of Intention to adopt the portion of the State highway which has been under study. This Resolution of Intention is then sent to every public entity through which that portion of the State highway passes. Any one of the public entities concerned, or the Highway Commission on its own motion, may call for a further public hearing on the route by the Highway Commission itself. If no hearing is requested, or after a hearing is held where requested, the Highway Commission passes a resolution adopting one of the alternates as the State highway. After adoption of the location, the design processes are begun by the Department of Transportation which will ultimately lead to the highway construction project.

One other factor in California's highway construction process that should be mentioned is that the California Highway Commission's powers, in addition to route adoption, include the power to adopt the

budget for State highway expenditures. This Commission power is important because under CEQA one of the milestones for environmental consideration is at the time the project is budgeted.

B. ENVIRONMENTAL CONSIDERATIONS

Concurrently with the route adoption process set forth above, the environmental analysis necessary under both CEQA and NEPA have been proceeding. The processes are geared so that, at the time that the California Highway Commission passes the resolution adopting one of the alternates as the State highway route, they have in their hands a final EIR (EIS), which has been processed through all of the State environmental processes under CEQA, though the processing of the EIS under NEPA is not complete. During the route adoption process, FHWA officials have worked with the staff of the Department of Transportation in the development of the EIR (EIS) and have received a draft copy of it. However, in the State-Federal relationship, the Federal Government, through the FHWA, cannot give approval to the route location until the California Highway Commission has acted. Further, the FHWA cannot give final approval to the location until the EIS (EIR) has received Federal approval. (A chart showing the environmental process leading to route adoption has been included in this paper as Exhibit B.

Thus, the dilemma is presented wherein the California Highway Commission, under CEQA, must have in its hands a final approved EIR (EIS) on the route location before it can act pursuant to State law; but, at the time that it takes this action on what is purportedly a final environmental review document, the FHWA is not in a position to approve the environmental clearance document because they have not, and cannot, act prior to action by the California Highway Commission on the route.

Where a dilemma like the one outlined above is presented to a state having its own environmental impact statement process, different solutions may be adopted, depending upon the legislative authority under which the state operates.

In California, we utilize two methods to overcome the problems involved. On most of our major projects, we have a continuing environmental review throughout all stages of the project, and such review continues even after the final EIR (EIS) has been presented to the Commission at the route adoption stage. The continuing environmental review may result in a supplemental EIS (EIR) being prepared and presented at the design hearing stage of the project. This continuing environmental review and the supplemental EIS brings to the fore any environmental problems that may have been uncovered after the preparation of the original EIS (EIR). The supplemental EIS (EIR) and the results of the continuing environmental review can then be presented to the California Highway Commission at the time that the project is budgeted for construction. Since the Highway Commission is the budgeting authority for highway projects, they can be made aware of any changes that have occurred as to the environmental effects of the project as the design is completed and the project is presented to them for financing. One of the main considerations of the continuing environmental review after the original route adoption by the Highway Commission is the provision for mitigating measures that CEQA requires. Often these mitigating measures can be more clearly identified and provided for at the design stage.

C. ONGOING PROJECTS

The problems of satisfying both State and Federal environmental clearance requirements with ongoing projects are considerably less

than those encountered with new projects. The primary concern experienced by our Department under CEQA in this regard has been the requirement under CEQA that the EIR be presented to the Commission at the time of budgeting if the project has not received environmental clearance at an earlier stage. This requirement for environmental clearance at the budgeting stage may precede the time requirement for obtaining Federal approval under NEPA. The main problem is one of timing, and a project may have to await final environmental clearance before the project is budgeted, though in the normal course of events ample time would have been available to obtain environmental clearance under NEPA after budgeting, but before construction, if it were not for the requirement of CEQA. This has had the effect of delaying some projects.

D. LITIGATION PROBLEMS WITH STATE AND FEDERAL ENVIRONMENTAL ACTS

Multiplicity of Court Actions. In California, where a project requires compliance with both CEQA and NEPA, there is a potential for a two-pronged attack to be made on the same project--one in the State court under CEQA, and the other in Federal court under NEPA.

In California, we are presently faced with precisely that situation where "Friends of the Earth, et al." as plaintiffs have brought an action in State court[42] challenging the use of borrow material from a particular location, alleging that the State has failed to comply with the requirements of CEQA. In the State court action, the State and its officials are named as defendants, and conversely, neither the FHWA nor any Federal official is named as defendant. The prayer in the State court action is to prevent award of a contract for construction of a portion of Interstate Route 5 in San

Joaquin County. This action is presently pending in the San Francisco Superior Court.

In a parallel suit filed in the Federal District Court for the Northern District of California,[43] the same plaintiffs filed an action on the same project, alleging the same facts but naming only FHWA and Federal officials. The prayer in that action is to enjoin the Federal officials from concurring in the award of contract wherein the particular borrow site was named as a mandatory source of materials. In the Federal court action, the court has denied the request for a preliminary injunction. In the meantime, bids have been opened, calling for award of the project, but such award must necessarily await the resolution of the actions in both courts.

While this is the first situation in California where we have been sued on a highway project simultaneously in both State and Federal courts, there have been other situations where the plaintiffs have sued either on CEQA or NEPA, choosing what they felt would present the best forum for success in stopping the project. We, of course, have had several actions filed in Federal court alleging noncompliance with both CEQA and NEPA.

While, as I have mentioned, the Friends of the Earth v. Walton and Friends of the Earth v. Brinegar are the first instance of dual suits being filed on a project, we anticipate that there will be others filed in the future. It is too early to tell at this time whether we will be able to require consolidation of such actions, but at the present time we do not see much hope in this direction. One of the primary problems which any state agency has when suit is brought at the construction stage is that delays are of benefit to the plaintiffs and act to the detriment of the state. Any action leading

toward consolidation of the actions would necessarily cause delay and would therefore probably not be in the best interests of the State, even if they were successful in such endeavor.

We are hopeful that both the Federal and State courts will arrive at a similar decision in the matter, and we are presently at a loss to anticipate what the effect would be of an affirmative decision in one court and an adverse one in the other.

E. COLLATERAL PROBLEMS

Raising Environmental Matters in Condemnation Actions. While not necessarily a problem of coordinating NEPA and CEQA, some problems have arisen where the environmental matters have been raised on condemnation actions brought to acquire land necessary for the projects. In a case presently in the appellate court in California,[44] where a project had received Federal environmental clearance under CEQA and FHWA guidelines, but without the preparation of an environmental impact statement, the failure to have prepared an environmental impact statement was raised in a condemnation action. This is the first case in which this issue has been raised in California, but environmental issues have been raised in condemnation actions in other states.[45]

F. PREPARATION OF EIS BY STATE HIGHWAY DEPARTMENT

A question which has generated a surprisingly long series of cases is whether a state-prepared EIS, later reviewed by FHWA, satisfies NEPA. In a recent opinion, the Eighth Circuit[46] exhaustively reviewed previous cases on this point and determined that the FHWA could delegate the duty of preparing an EIS to a state agency. This view coincides with earlier opinions issued by the Ninth and Tenth Circuits,[47] and is distinguished from a contrary decision by the Second Circuit.[48] "Significant and active" participation of the

responsible Federal agency in the preparation of the EIS by the state is viewed by the three circuits as satisfying NEPA. Review, modification, and adoption by FHWA of an EIS prepared by the state constituted neither an abdication of FHWA's responsibility under NEPA to the state highway commission, nor a mere rubber-stamping of an unreviewed EIS.[49] The information-gathering function assigned the state via PPM 90-1 was approved by the Eighth Circuit, noting that an administrative interpretation of a statute by an agency charged with its enforcement is entitled to great deference, citing several U.S. Supreme Court opinions.[50] This approach approves state agency preparation pursuant to FHWA regulations issued to satisfy NEPA, and represents a judicial approach very favorable to current State procedures.

FOOTNOTES

1 California Statutes 1970, Chapter 1433.

2 California Public Resources Code § 27000 et seq.

3 Arizona, California, Connecticut, Delaware, Georgia, Hawaii, Indiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Mexico, Nevada, North Carolina, Texas, Virginia, Washington, Wisconsin, and Puerto Rico.

4 Friends of Mammoth v. Board of Supervisors (1972), Ca. Sup. Ct., 8 Cal.3d 247, 4 E.R.C. 1593

5 Treyna, Environmental Impact Requirements in the States, reprinted in 102 Monitor, Vol. 3, No. 3, April 1973, at 21 et seq. Since the survey was printed, statutes were enacted in Maryland, Minnesota, and Virginia. See also Yost, NEPA's Progeny: State Environmental Policy Acts, 3 E.L.R. 50090 et seq.

6 See draft Suggested State Environmental Policy Act, reprinted in 102 Monitor, Vol. 3, No. 3, April 1973, pages 10-18.

7 Section 3, entitled "Findings and Declarations of State Environmental Policy", is in large measure drawn from CEQA, as a glance at California Public Resources Code Section 21000 will reveal. But the model act also contains the following, potentially troublesome, language:

> "It is the intent of the Legislature that the protection and enhancement of the environment shall be given appropriate weight with social and with economic considerations in public policy. Social, economic, and environmental factors shall be considered together in reaching decisions on proposed public activities." (Emphasis added.)

Since Section 4, dealing with definitions of terms to be found in the act, defines "environment" as "the physical conditions which will be affected by a proposed action including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance", a degree of ambiguity is present. Such ambiguity is compounded by the fact that Section 6, "Guidelines and Agency Procedures", states that social and economic factors may be considered in determining the significance of an environmental impact.

8 "Guidelines for Implementation of the California Environmental Quality Act of 1970", § 15085(g), Resources Agency of California [hereafter "CEQA Guidelines].

9 Friends of Mammoth, supra.

10 California Public Resources Code § 21000 et seq.

11 California Public Resources Code §§ 21060-21080; defines key terms in CEQA and limits CEQA's application to certain projects.

12 California Public Resources Code §§ 21168 and 21168.5; limiting court to review of agency decision on basis of substantial evidence, not independent judgment.

13 California Public Resources Code § 21167; limiting period for challenge to agency action without EIR to 180 days, and requiring challenge to agency determination of significant environmental impact of project and EIR to 30 days from filing of notice of determination.

14 CEQA Guidelines § 15080.

15 Public Resources Code §§ 21084-21086.

16 CEQA Guidelines §§ 15100-15115; existing facilities (§ 15101), replacement or reconstruction (§ 15102), new construction of small structures (§ 15103), minor alterations to land (§ 15104), information collection (§ 15106), loans (§ 15110), minor accessory structures (§ 15111), etc.

17 CEQA Guidelines § 15083.

18 Arlington Coalition on Transportation v. Volpe (1972), 4th Circuit, 458 F.2d 1323.

19 La Raza Unida v. Volpe (1971), U.S.D.C., N.D. Ca., 334 F.2d 221; Sierra Club v. Volpe (1972), U.S.D.C., N.D. Ca., 4 E.R.C. 1804.

20 op. cit., Mammoth.

21 Keith v. Volpe (1972), U.S.D.C., C.D. Ca., 4 E.R.C. 1350, provides in part:

> "The resemblance between NEPA and CEQA is so uncanny that the conclusion is inescapable that CEQA was deliberately modelled after NEPA. Therefore the same consideration ought to govern the applicability of both statutes ..." (at 1358)

Sierra Club v. Volpe (1972), supra

22 California Public Resources Code § 21150.

23 42 U.S.C.A. § 4332(c)(i-v).

24 California Public Resources Code § 21101.

25 CEQ Guidelines § 1500.8(a)(e)(ii), Federal Register, August 1, 1973, Vol. 38, Number 147, Part II.

26 CEQ Guidelines §§ 1500.8(a)(5) and (a)(8).

27 CEQ Guidelines § 1500.8(a)(5).

28 CEQA Guidelines § 21083.5.

29 CEQA Guidelines § 15070 provides:

> "Ongoing Project:
>
> "(a) A project covered by Section 15037(a)(1) definition of project specified by these Guidelines, approved prior to November 23, 1970, shall not require an Environmental Impact Report or a Negative Declaration -- unless it is a project which may have a significant effect on the environment, and
>
> "(1) A substantial portion of public funds allocated for the project have not been spent and it is still feasible to modify the project in such a way as to mitigate against potentially feasible adverse environmental effects, or to choose feasible alternatives to the project, including the alternative of "no project" or halting the project; or
>
> "(2) The responsible agency proposes a modification to the project plan, such that the project might have a new significant effect on the environment.
>
> "(b) Notwithstanding the above, projects which come under the jurisdiction of the National Environmental Policy Act (NEPA) and which, through regulations promulgated under NEPA, were held to be too far advanced at the time of NEPA's effective date to require an EIS in compliance with those Guidelines, do not require an EIR under CEQA -- unless they fall under (2) above."

30 Arlington Coalition on Transportation, supra, cert. denied sub. nom., Fugate v. Arlington Coalition on Transportation, _____ U.S. _____, 4 E.R.C. 1752 (1972).

31 Environmental Law Fund v. Volpe (1972), U.S.D.C., N.D. Ca., 340 F.Supp. 1328.

32 Sierra Club v. Volpe (1972), U.S.D.C., N.D. Ca., 4 E.R.C. 1804, 1811.

33 County of Inyo v. Yorty (1973), Ca. Ct. of Appeal, Third App. District, 5 E.R.C. 1431.

34 California Public Resources Code § 21167(a).

35 California Public Resources Code § 21167(b).

36 California Public Resources Code § 21167(c).

37 Sullivan v. Volpe (1972), U.S.D.C., E.D. Ca., No. Civil S-2609.

38 California Streets and Highways Code Section 70.

39 California Streets and Highways Code Section 305.

40 California Streets and Highways Code Section 210.

41 California Administrative Code, Vol. 17, Title 21, Public Works.

42 Friends of the Earth v. Walton (1974), Superior Court, City and County of San Francisco, No. 668-512.

43 Friends of the Earth v. Brinegar (1974) U.S.D.C., N.D. Ca., C-73-2184 RHS.

44 Bosio/PLUS v. Division of Highways (1973), Court of Appeal, 2nd Appellate District, Civ. No. 42741.

45 County of Freeborn v. Bryson (1973), 210 N.W.2d 290 (Minn.); Seadade Industries v. Fla. P. & L. Co. (1971), 245 S.2d 209, 47 A.L.R.3d 1255 (Fla.).

46 Iowa Citizens v. Volpe (1973), U.S.C.A. 8, 6 E.R.C. 1088; contains an excellent summary of cases dealing with preparation of FHWA EIS by state highway agencies. See also an article by Hugh J. Yarrington in Monograph 17, Environment Reporter, Vol. 4, No. 36.

47 Life of the Land v. Brinegar (1973), U.S.C.A. 9, 5 E.R.C. 1780; Citizens Environmental Council v. Volpe (1973), U.S.C.A. 10, 5 E.R.C. 1989.

48 Greene County Planning Board v. FPC (1972), U.S.C.A. 2, 455 F.2d 412.

49 op. cit., Iowa Citizens v. Volpe, supra, at 1091.

50 Ibid.

SUMMARY OF STATES HAVING EIS REQUIREMENTS

Exhibit A

Arizona	Administrative requirement. Fish and Game Department required to prepare EIS on proposed water-oriented development projects. Similar to NEPA but abridged.
California	Statutory requirement. First state statute following NEPA. Applies to state and local agencies and private actions requiring governmental approval. EIS elements similar to NEPA but include consideration of growth-inducing impact and mitigation measures.
Connecticut	Executive order requirement in effect until statute takes effect 2-1-75. Statute limited to actions undertaken or funded by state. EIS elements similar to NEPA but include analysis of long term vs. short term cost-benefits.
Delaware	Statutory requirement. Included as part of Coastal Zone Act, and limited to coastal zone, and manufacturing projects.
Georgia	No general requirement but EIS required for Georgia Tollways Authority projects.
Hawaii	Executive order requirement. Limited to state projects, including roads and highways.
Indiana	Statutory requirement. Applies to state projects. Issuance of licenses or permits specifically excluded. EIS elements similar to NEPA.
Maryland	Statutory requirement. Applies to state actions only. Requires "Environmental Effects Report."
Massachusetts	Statutory requirement. Applies to state and local agency actions.
Michigan	Executive direction requirement. Applies to State action including issuance of permits. EIS elements similar to NEPA but include mitigation modifications.
Minnesota	Statutory requirement. Most recent enacted.
Montana	Statutory requirement. Applies to state actions including issuance of licenses and permits. EIS elements similar to NEPA.
Nebraska	No general requirement but EIS prepared by Department of Roads on state funded highway projects.
Nevada	Statutory requirement. Limited to utility plants.
New Mexico	Statutory reqirement. Applies to state actions, including legislation recommendations. EIS elements similar to NEPA.
North Carolina	Statutory requirement. Applies to public actions including legislation recommendations. Permits local governments to require EIS for major private development. EIS elements similar to NEPA but include mitigation. As written would terminate on 9-1-73 unless extended.
Texas	Procedures established administratively. Applies to State agencies but suggests rather than mandates EIS review.
Virginia	Statutory requirement. Highways and roads specifically excluded.
Washington	Statutory requirement. Applies to state and local agency actions, and private actions requiring government permit. EIS elements similar to NEPA.
Wisconsin	Statutory requirement. Applies to state actions. Department of Natural Resources may require EIS from permit applicant. EIS elements similar to NEPA but include long term and short term beneficial aspects, and economic advantages.

ENVIRONMENTAL PROCESS

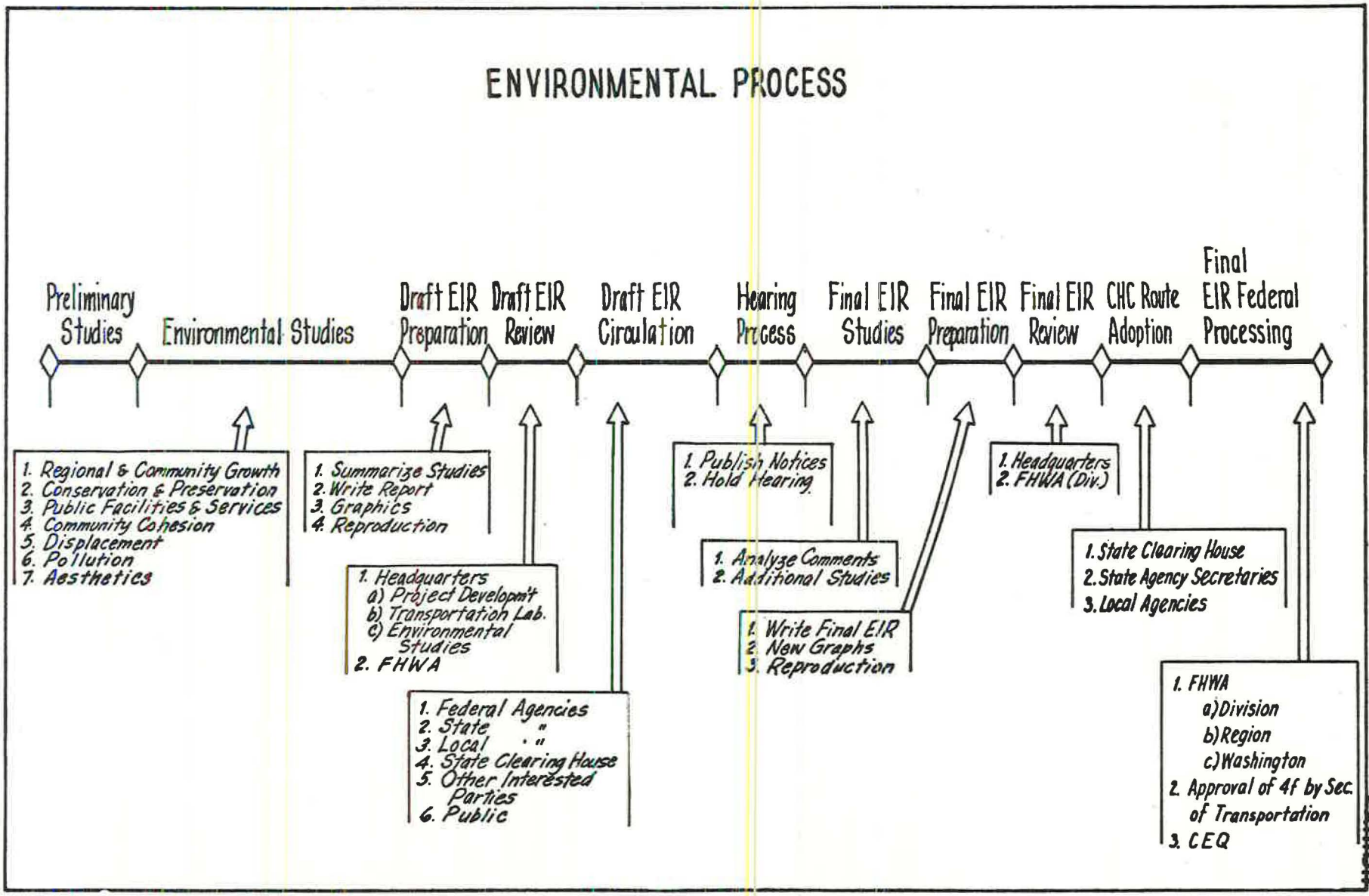

Exhibit B