Planning or Precommitment? Assuring a Good Faith Consideration of the EIR's CEQA Mandate

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Since the California Environmental Quality Act was enacted, early consideration of the impacts of a project has been required. Nonetheless, it is only recently that the issue of precommitment has come to the fore. The cases of *Citizens for Responsible Government v. City of Albany* (1997) 56 Cal.App.4th 1199, and *City of Vernon v. Board of Harbor Comrs.* (1998) __ Cal.App.__, 74 Cal.Rptr. 2d 477, decided within eight months of each other, demonstrate the increasing attention being paid to the question of whether an agency may be impermissibly committed to a project prior to completion and consideration of the project's EIR. This article examines the spectrum of activities, from appropriate planning, or even activities which demonstrate institutional bias, to activities which may precommit an agency to a project so as to make meaningful consideration of the EIR impossible. It explores the question of whether such a precommitment is prohibited by law when there is no formal agency approval.

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I. The State of the Law on Precommitment

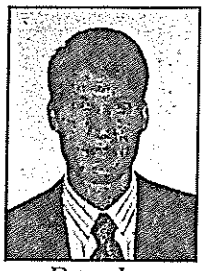
A. The Policy of Early EIR Preparation and Concerns with Post Hoc Rationalizations

In enacting CEQA, the Legislature found it is the policy of the state that "[l]ocal agencies integrate the requirements of this division [CEQA] with planning and environmental review procedures otherwise required by law...so that all those procedures, to the maximum feasible, run concurrently, rather than consecutively." Public Resources Code ("PRC") section 21003(a). The CEQA Guidelines, 14 Cal.Cd.Rgs. ("Guidelines") is clearer as to timing, stating EIRs:

> should be prepared as early as feasible in the planning process to enable environmental considerations to influence project program and design and yet late enough to provide meaningful information for environmental assessment.... *With public projects, at the earliest feasible time, project sponsors shall incorporate environmental considerations into project conceptualization, design, and planning.* CEQA compliance should be completed prior to acquisition of a site for a public project.

Guidelines, sections 15004(b) and (b)(1), emphasis added.

The California Supreme Court has condemned using EIRs as a *post hoc* rationalization for decisions that had already been made:



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> A fundamental purpose of an EIR is to provide decisionmakers with information they can use in deciding *whether* to approve a proposed project, not to inform them of the environmental effects of projects that they have already approved. If post-approval environmental review were allowed, EIRs would likely become nothing more than *post hoc* rationalizations to support action already taken. We have expressly condemned this use of EIRs.

Laurel Heights Improvement Association v. Regents of the Univ. of Cal. (1988) 47 Cal.3d. 376, 394 *reh'g denied,* citing *No Oil, Inc v. City of Los Angeles* (1975) 13 Cal. 3d. 68, 79. ("*Laurel Heights I*")

Cases decided after *Laurel Heights I* continue to condemn EIRs that are *post hoc* rationalizations. In *City of Santee v. County of San Diego* (1989) 214 Cal. App.3d 1438, the City of Santee sued San Diego, challenging a temporary jail expansion. The Court of Appeal found the EIR inadequate in its failure to describe all reasonable alternatives to the project and any feasible mitigation measures. *Id.* at 1454. In directing the County to prepare and certify a new EIR, the court said:

> The County is reminded, however, that like the Supreme Court in *Laurel Heights*, this court will not countenance any attempt to reject an alternative on the ground that [the preferred alternative] has already been completed and is already in use. [Citation.] The Board must begin anew the analytical process required under CEQA and must not attempt to give post hoc rationalizations for actions already taken in violation of CEQA, *even if done in good faith.*

Id. at 1456, emphasis added.

Thus, the courts may examine an agency's process to assure appropriate consideration is given to environmental factors during the decision making process. In its most recent consideration of

CEQA, the California Supreme Court rejected a post-approval response to comments by the Fish and Game Commission. The Court stated:

> The Commission's post-decisionmaking responses to significant environmental concerns do not satisfy the written response component of its certified regulatory program. Nor do they comply with the spirit of this requirement. The written response requirement ensures that members of the Commission will fully consider the information necessary to render decisions that intelligently take into account the environmental consequences. (Citations omitted.) It also promotes the policy of citizen input underlying CEQA. (*People v. County of Kern* (1974) 39 Cal.App.3d. 830, 841, 115 Cal.Rptr. 67.) When the written responses are prepared and issued after a decision has been made, however, the purpose served by such a requirement cannot be achieved.

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Mountain Lion Foundation v. Fish and Game Commission (1997) 16 Cal. 4th 105, 133.

If a lead agency becomes too committed to a project, formal approval of the project, no matter the environmental impacts associated with it, may become inevitable. This issue is not limited to the CEQA context. *Redevelopment Agency v. Norm's Slauson* (1985) 173 Cal. App.3d 1121 presented a picture of precommitment by an agency that eliminated the agency's ability to properly consider the project before it. In *Norm's Slauson*, the Huntington Park Redevelopment Agency brought an action in eminent domain to take the major portion of a restaurant's parking lot. However, before holding the required hearing on a resolution of the necessity of exercising its powers of eminent domain, the agency agreed with a developer to acquire the property for transfer to the developer, and issued and sold tax exempt bonds to pay for it. *Id.* at 1125. The court held that "the hearing which led to the adoption of the resolution of necessity was a sham and the Agency's policy making board simply 'rubber-stamped' a predetermined result." *Id.* at 1127.

Whether pre-certification activities or agreements preclude meaningful consideration of alternatives and mitigation measures requires a fact-specific inquiry. Part of the review must entail the extent to which the early activities or agreement precluded effective public participation in the process. The importance of the interactive role between the public and decisionmakers was recognized by the Supreme Court in *Concerned Citizens of Costa Mesa v. 32nd District Agricultural Association* (1986) 42 Cal.3d 929. *Concerned Citizens* emphasized the critical role of public participation in the CEQA process:

> "CEQA compels an interactive process of assessment of environmental impacts and responsive project modification which must be genuine. It must be open to the public, premised upon a full and meaningful disclosure of the scope, purposes, and effect of a consistently described project, with flexibility to respond to unforeseen insights that emerge from the process." (*County of Inyo v. City of Los Angeles* (1984) 160 Cal.App.3d 1178, 1185, 207 Cal.Rptr. 425.) In short, *a project must be open for public discussion and subject to agency modification during the CEQA process. (Ibid.)* This process helps demonstrate to the public that the agency has in fact analyzed and considered the environmental implications of its action.

Id. at 936, emphasis added.

B. Private Projects and Precommitment

It is generally easier to avoid the specter of precommitment with private than with public projects. However, most CEQA practitioners have observed cases where an agency is so anxious for project related revenue that a project will be approved as proposed, regardless of the impacts disclosed in the EIR. One example of an activity, which raises the

issue of precommitment in the private project context, is the extensive negotiation of a Development Agreement prior to consideration of an EIR.

Citizens for Responsible Government v. City of Albany presents an example of this type of precommitment. There, presentation of a completed Development Agreement to city voters before CEQA review of the project was conducted was found to be an impermissible preapproval of the project. Petitioners sued the City of Albany after the City approved (1) a zoning amendment which would have allowed development of a racetrack, (2) a gaming ordinance to regulate cardroom gaming which would occur there, and (3) a ballot proposal to authorize gaming within the city limits. The City had proceeded with its approvals under the assumption that submitting the ballot proposal to the voters would not be a project under CEQA and would therefore be exempt from its requirements. Albany also negotiated and submitted for voter approval an unexecuted 95-page development agreement with the owner of the affected property. After the voters narrowly approved gaming, the mayor executed the development agreement in the same form as submitted to the voters.

The Court of Appeal found the zoning amendment was properly exempt under CEQA but the development agreement was not. The Court of Appeal reasoned that the City Council had effectively adopted the 95-page development agreement "even though it neglected to pass a formal resolution reciting this action" when it approved the placement of the development agreement on the ballot. *Albany*, at 1219. While the agreement contained provisions for an environmental review process, the court concluded that the City violated CEQA because the language of the provision for environmental review conflicted with CEQA, since the review would follow approval of the development agreement and related measures and because the City's discretion to adopt alternatives and mitigation measures that might be required for an adequate CEQA review was impermissibly limited by the development agreement. *Albany*, at 1223.

The court noted that extensive negotiation of the details of development agreements or other similar instruments can lend momentum to a certain configuration of a planned project, which is difficult to counter later in the approval process:

> [T]he appropriate time to introduce environmental considerations into the decision making process was during the negotiation of the development agreement. Decisions reflecting environmental considerations could most easily be made when other basic decisions were being made, that is, during the early stage of "project conceptualization, design and planning." Since the development site and the general dimensions of the project were known from the start, there was no problem in providing "meaningful information for environmental assessment." At this early stage, environmental review would be an integral part of the decision-making process. Any later environmental review might call for a burdensome reconsideration of decisions already made and would risk becoming the sort of "*post hoc* rationalization [ ] to support action already taken," which our court disapproved in *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 394. *Albany*, at 115.

C. "Inevitability" Of Institutional Bias and the Public Project

When a public rather than private project is at stake, a lead agency's task of avoiding precommitment may be more difficult. Naturally, public agencies only conduct extensive environmental review of their "preferred project." For public agencies to conduct extensive environmental review of projects they do not view favorably, would be wasteful of time and money. In fact, in two cases [*Vernon* and *Residents Ad Hoc Stadium Committee v. Board of Trustees* (1979) 89 Cal.App.3d. 274] courts have recognized that "institutional bias" may be inevitable.

In *Vernon*, the City of Long Beach, as Local Reuse Authority responsible for disposition of the Long Beach Naval Station after demilitarization under the Defense Base Closure and Realignment Act ("DBCRA"),[1] developed a Reuse Plan in 1993 designating all the coastal access Navy properties for development of a cargo container terminal. Subsequent changes in DBCRA caused the City of Long Beach to revisit its reuse plans in 1995. In the meantime, the federal government decided to place the adjacent Long Beach Naval Shipyard on the list of surplus properties. In 1996, a study conducted by the Navy revealed extensive historical value associated with buildings located on the Naval Station in an area called the Roosevelt Historic District.

After the City's Harbor Department approved in environmental impact report for construction of the cargo container terminal, the cities of Vernon and Compton, and a preservation group named Long Beach Heritage ("Heritage"), filed separate petitions seeking writs of mandate alleging various inadequacies in the EIR prepared by the City. The petition by Heritage also alleged impermissible precommitment to the project based upon the prior plans, various activities in support of the project, and a detailed Statement of Intent between the Executive Director of the Port and the President of the China Ocean Shipping Company ("COSCO"), the intended lessee of the terminal. The trial court found the EIR adequate but held that the Port had improperly committed itself to the project prior to environmental review. The trial court remanded the EIR to the Port to reconsider it. When the Port reapproved the project without first setting aside the lease it had entered into with COSCO, the court again remanded the project, and then issued the writ.

The City of Long Beach appealed the trial court's decision. During briefing, 117 California Cities filed an *amicus curiae* brief on behalf of the City of Long Beach arguing that the decision would upset planning activities throughout the State. During the pendency of the litigation, the Navy and the City agreed to prepare a new EIR/EIS. The Navy contracted out for an independent study of possible reuses of the

base, the study long sought by Heritage. The City also agreed to set aside $4.5 million in a preservation trust fund for use in Long Beach as mitigation for loss of the Historic District should the terminal project go forward. Heritage urged the Port to agree to a settlement whereby consideration of the Reuse Study would be considered a cure to the problem of precommitment. The Port refused. Reluctantly, Heritage agreed to settle its case with the City of Long Beach. Because the cases had been consolidated, Vernon defended the appeal.

The Court of Appeal affirmed the trial court's finding regarding the adequacy of the EIR but reversed on the precommitment issue. The Court of Appeal reasoned: "[i]f having a high esteem for a project before preparing an EIR nullifies the process, few public projects would withstand judicial scrutiny, since it is inevitable that the agency proposing a project will be favorably disposed toward it." *Vernon*, 74 Cal. Rptr.2d at 502–503.

The precommitment decision of the trial court relied in large part on the peculiarities associated with the military base reuse process: for the trial court, the 1993 and 1995 reuse plans prepared by the City were part of the evidence showing that the City was committed to the cargo container terminal project which had not been subject to environmental review until 1996. The Court of Appeal disagreed that the plans were an impermissible pre-approval of the terminal project, reasoning that DBCRA required development of reuse plans and that Public Resources Code section 21083.8, applicable to military base reuse plans, allowed preparation of environmental reports after development of those plans.

In reaching its conclusion, the Court of Appeal cited the first case to specifically respond to a challenge of precommitment, *Residents Ad Hoc Stadium Committee v. Board of Trustees.* In *Residents*, plaintiffs challenged an EIR prepared by the trustees of the California State University system for the construction of an athletic stadium. The stadium project had been planned and approved "prior to the effective date" of CEQA. *Residents*, at 284. *For that reason*, the agency involved was "particularly vulnerable to charges of institutional bias," especially since its ultimate decision was in favor of proceeding with a project previously conceived or planned. *Id.* The court in *Residents* rejected that challenge because the planning occurred prior to the effective date of CEQA. At the same time, the court stated: "if the environmental evaluation occurs before the agency is committed to or plans a project, bias may be less likely and not as easily asserted." *Residents*, at 285. Furthermore, CEQA has now guided public agency approval processes for over 20 years. There is a good argument that the leniency accorded to the institutionally-biased decisionmakers in 1979 when *Residents* was decided is not appropriate today.

Even if "institutional bias" is acceptable, may an agency step over the line from "predisposition" to "precommitment?" In considering this question, it may be useful to consider that with public projects, project sponsors are expected to incorporate environmental considerations at the earliest feasible time into project conceptualization, design, and planning.

A case which has been relied upon by some to support the proposition that agencies have discretion to choose a particular alternative prior to environmental review is *Stand Tall on Principles v. Shasta Union High School District* (1991) 235 Cal.App.3d 772. In *Stand Tall* the court specifically allowed identification of a preferred site prior to completion of an EIR *as long as an EIR was completed and considered prior to the District acquiring the site.* The court recognized that the District needed to have a preferred site in order to make the EIR meaningful, but emphasized the need for a good faith review of the EIR. The court said:

> If STOP [the petitioner] contends an EIR is required for all potential sites encompassed in a site selection process, that EIR may prove too cumbersome and yield little of value given its lack of focus...if STOP contends an EIR is required prior to the ultimate selection of a particular site, that in effect is what is going to occur here when the District prepares the EIR on its preferred site *in the context of a genuine and thorough assessment of all reasonable alternative sites.* To us this last option strikes the right balance in this case. We stress, however, that the EIR we envision must serve in a practical sense as an important contribution to the decision-making process and *must not be used to rationalize or justify a decision already made.*

Stand Tall, supra, 235 Cal. App.3d at 782, emphasis added.

Another case interpreted by some as barring challenges based upon agency precommitment is *Uhler v. City of Encinitas* (1991) 227 Cal.App.3d 795. In *Uhler* preliminary approval of a traffic mitigation plan without environmental review was held not to violate CEQA. The court reasoned that the City Council had to "approve" a plan in order to direct the staff to conduct studies on the specific provisions of the plan. *Id.* at 804. The court also found acceptable the use of a Negative Declaration for the project because there was substantial evidence to support the finding that the traffic control project would have no significant impact on the environment when mitigation measures were incorporated. *Id.* at 805.

However, *Uhler* is very different from the situation where an early commitment is made to a project and no degree of environmental review can change the outcome. *Uhler* involved a relatively minor traffic mitigation project that was the subject of extensive public hearings and discussion of alternatives. *Id.* at 800. The flexibility of the City Council was shown by the fact it modified the proposed plan after the preparation of a negative declaration, based upon a subsequent report. *Id.* at 801.

D. Is An "Approval" or a "Binding Commitment" Required to Show Impermissible Precommitment?

The Court of Appeal's decision in *Vernon* appears to preclude a finding of an impermissible

precommitment unless an agency has formally acted on a project or made a "binding commitment." The court quoted the CEQA Guidelines definition of "approval" and then stated "[t]he agency commits to a definite course of action not simply by being a proponent or advocate of the project, but by agreeing to be legally bound to take that course." *Vernon* at 503. To support this proposition, the court cited *No Oil, Inc v. City of Los Angeles* (1974) 13 Cal.3d 68, 76, 81; *Citizens for Responsible Government v. City of Albany* (1997) 56 Cal.App.4th 1199, 1213; and *Save Our Skyline v. Board of Permit Appeals* (1976) 60 Cal.App.3d 512, 521. A close examination of these cases does not fully support the proposition that there must be a binding legal commitment before impermissible precommitment can be found.

No Oil, Inc. was a challenge by nonprofit organizations to the validity of a Los Angeles City ordinance allowing drilling of two exploratory oil wells without any environmental review. *No Oil, Inc.* involved an impermissible agency precommitment which led the Supreme Court to hold:

> No resolution adopted on [the relevant] date can constitute that determination of environmental impact prior to approval of the project which [CEQA] requires. The resolution adopted at that meeting represents simply an example of that "post hoc rationalization" of a decision already made, which the courts condemned in *Citizens to Preserve Overton Park v. Volpe* (1971) 401 U.S. 402, 91 S.Ct. 814 28 L.Ed.2d 136, 420 and *Environmental Defense Fund, Inc. v. Coastside County Water Dist.* (1972) 27 Cal.App.3d 695,706, 104 Cal.Rptr. 197.

No Oil, Inc., 13 Cal.3d at 81.

Albany dealt with agency "approval" in the context of submitting a zoning amendment measure to voters. The city council's resolution to place the matter on the ballot in *Albany* was not viewed as an "approval" under CEQA because of a special exemption for ballot measures. The *Vernon* case did not involve ballot measures so there could be no such exemption.

Save Our Skyline involved a "purely ministerial" building permit issued by a city's permit bureau that was appealed to a board empowered to exercise full discretion. The issue in that case was whether or not CEQA applied to a project that had obtained a permit before April 5, 1973. The trial court ruled and the Court of Appeal affirmed that CEQA did apply, that the project was not exempt, because a ministerial approval had been granted before April 5, 1973, but discretionary approval from the appeal board did not come until after that date. *Id.* at 522. The court emphasized the definition of "approval" in then Guidelines section 15021 (now section 15352(b)):

> ...approval occurs upon the earliest commitment to issue or the issuance by the public agency of a discretionary contract, grant, subsidy, loan, or other form of financial assistance, lease, permit, license, certificate, or other entitlement for use of the project.

Id. at 516.

It can be seen that nowhere in the definition of "approval" is there a requirement for an agreement to be legally bound to take a certain course of action.

Requiring a legally binding commitment appears to be contrary to the mandate that "CEQA is to be interpreted 'to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.' *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259." *Mountain Lion Foundation v. Fish and Game Commission* (1997) 16 Cal. 4th 105, 112. The requirement for a legally binding commitment seems to improperly elevate form over substance and frustrate the public policy goals of CEQA.

The CEQA Guidelines provide a very specific definition of what constitutes project "approval" for the purposes of CEQA. Section 15352 states: "'Approval' means the decision by a public agency which commits the agency to a definite course of action in regard to a project...." However, the CEQA Guidelines have failed to provide guidance as to when the agency goes too far with regard to pre-CEQA activities. The new proposed section 15004(b)(3) may change that. The proposal provides that agencies should not:

> (A) Formally make a decision to proceed with the use of a site for facilities which would require CEQA review, regardless of whether the agency has made any final purchase of the site for these facilities, except that agencies may designate a preferred site for CEQA review and may enter land acquisition agreements when the agency has conditioned its future use of the site on CEQA compliance.
>
> (B) Commit or solicit funding for a specific project where the agency binds itself to use the funding to implement the project.
>
> (C) Otherwise take any action which gives substantial impetus to a planned or foreseeable project in a manner that forecloses alternatives or mitigation measures that would ordinarily be part of subsequent CEQA review of that public project.

It may be advisable to also prohibit the commitment of substantial funds for development of detailed design activity beyond that which is required for conducting a meaningful environmental review until an EIR has been prepared. Thus, the Guidelines may yet shed additional light on how a good faith consideration of an EIR can be achieved, and not be prejudiced by prior activities with regard to a particular decision.

II. Proving Precommitment

Several issues may arise of concern to the CEQA practitioner about how a precommitment allegation might be established. Clearly, the mental state of a decisionmaker cannot be probed. However, what if decisionmakers actively support a project prior to

completion of environmental review? As the *amicus curiae* California Cities pointed out in their brief in *Vernon*, a candidate for office should not be constrained from taking a position on a project because environmental review had not yet been completed. However, there is a difference between decisionmakers' mental state and acts evidencing precommitment. In *Vernon*, assume for a moment that prior to the environmental review: (1) there were large monetary commitments for design contracts awarded by the public agency; (2) the agency staff advocated for the project locally and in Washington, D.C.; and (3) the Vice President of the Board of Harbor Commissioners went to the White House to lobby for the terminal project. Is such evidence relevant? What if the evidence was not included in the administrative record? Are the actions of the staff attributable to the decisionmaker?

A. Objective Evidence May be Considered, But Not the Decisionmakers' State of Mind

It is well established that the courts will not examine the state of the mind of a decisionmaker.

> [W]ith reference to the enactments of all legislative bodies...the courts cannot inquire into the motives of the legislators in passing them, *except as they may be disclosed on the face of the acts, or [inferable] from their operations.*

City of Santa Cruz v. Sup. Ct (1995) 40 Cal.App.4th 1146, 1151, brackets in original. Likewise, in a CEQA adequacy case, *Del Mar Terrace Conservancy v. City Council of San Diego* (1992) 10 Cal.App.4th 712, the Court of Appeal upheld the trial court's decision to exclude live testimony concerning the subjective reasoning of the decisionmakers and their staff. However, this does not preclude looking at the objective evidence of precommitment. For example, in *County of Los Angeles v. Superior Court (Burroughs)* (1975) 13 Cal.3d 721, 731, the court precluded discovery into the decisionmakers' intent. However, the Court noted that litigants may nonetheless be "able to demonstrate by virtue of objective criteria that a particular [action] was undertaken in bad faith in an attempt to circumvent...regulations." *Id.* In *Board of Supervisors of Los Angeles County v. Superior Court* (1995) 32 Cal.App.4th 1616, the court stated:

> The rule is general with reference to the enactments of all legislative bodies that the courts cannot inquire into the motives of the legislators in passing them, *except as they may be disclosed on the face of the acts, or inferable from their operation....*

Id. at 1624, emphasis added.

While mental state is not to be considered, petitioners' attorneys will continue to argue that certain activities may evidence a precommitment, short of a lease or some other "formal" approval. Such activities may run the spectrum from inordinate expenditures on design work not necessary for the preparation of environmental documentation; advocacy for the specific project before other agencies for funding or permits; or obtaining land, equipment, or services which are only needed if the project goes forward essentially as proposed.

B. Proving Precommitment in the Post-WSPA World[2]

When an administrative record is prepared, it normally includes only information which was, at least theoretically, "before" the decisionmaker, or a document described as part of the record pursuant to Public Resources Code section 21167.6(e). Especially when the respondent prepares the record, evidence of precommitment may be developed after the record is "settled." If evidence of prior action related to the project is subsequently found (for example through review of agency minutes), should this evidence be admitted or—if it is an official document—be subject to judicial notice? Respondents in a number of cases have asserted that such evidence is not admissible when the documents were not "offered to the Board," relying on *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559. However, minutes of an agency's prior actions are objective evidence of the agency's action, not information that should be submitted to it for it to consider. In any case, *Western States* does not support the position that objective evidence of precommitment should be excluded. *Western States* dealt with the issue of whether extra-record evidence could be considered in determining whether the Air Resources Board's rule making was supported by substantial evidence. The Court ruled that:

> ...a court generally may consider only the administrative record in determining whether a quasi-legislative decision was supported by substantial evidence within the meaning of Public Resources Code section 21168.5.

Western States at 573.

In explaining its rationale, the Court stated:

> Were we to hold that courts could freely consider extra-record evidence in these circumstances, we would in effect transform the highly deferential substantial evidence standard of review in Public Resources Code section 21168.5 into a *de novo* standard, and under that standard the issue would not be whether the administrative decision was rational in light of the evidence before the agency but whether it was the wisest decision given all the available scientific data.

Western States at 572.

However, the question of whether an agency was pre-committed to a project, like the adequacy of an EIR, is a matter subject to de novo review. *Los Angeles Unified School District v. Los Angeles* (1997) 58 Cal.App.4th 1019, 1023. As the California Supreme Court has recently stated:

> [T]he public agency bears the burden of *affirmatively demonstrating* that, notwithstanding a project's impact on the environment, the agency's approval of the proposed project followed meaningful consideration of alternatives and mitigation measures."

Mountain Lion Foundation v. Fish and Game Commission, (1997) 16 Cal. 4th 105, 134, emphasis added.

Furthermore, the Court in *Western States* specifically stated:

> We need not decide whether courts may take judicial notice of evidence not contained in the administrative record when...it would never be proper to take judicial notice of evidence that (1) is absent from the administrative record, *and* (2) was not before the agency at the time it made its decision...because only relevant evidence is subject to judicial notice.

Western States, supra, at 574, n. 4, emphasis in original.

In a sense, evidence of the agency's prior action has been before the agency. For example, minutes recording earlier actions must have been before the agency since it would have approved them, and they certainly may be relevant to the issue of whether the agency was precommitted to a certain project.

Furthermore, Public Resources Code section 21167.6(e)(10) provides that the administrative record should include:

> "Any other written materials relevant to the respondent public agency's compliance with this division [CEQA] or to its decision on the merits of the project...."

If an agency may be impermissibly precommitted to a project prior to formal action, then evidence of precommitment is relevant to the agency's compliance with CEQA and properly part of the record.

C. Are the Activities of the Staff Attributable to the Decisionmaker?

Even if there were not direct evidence of the knowledge of the decisionmaker regarding the activities of its staff, it may be possible to attribute the action of the staff to the decisionmaker. This question was discussed in *Laurel Heights I, supra*, 47 Cal.3d 376. There, a neighborhood association challenged the EIR for the relocation of a biomedical research facility approved by the Regents of the University of California. After the trial court denied the association's petition for a writ, the Court of Appeal reversed the trial court's judgment, holding the EIR did not adequately describe the "project," the discussion of project alternatives was inadequate, and there was no substantial evidence to support the Regents' conclusion that all significant environmental effects of the project would be mitigated. *Id.* at 389–390. In upholding the Court of Appeal's decision that the project description and discussion of alternatives were inadequate, the Supreme Court said:

> In short, there is telling evidence that the University, by the time it prepared the EIR, had either made decisions or formulated reasonably definite proposals as to future uses of the building.... To counter this evidence the Regents argue that only they can approve formal plans as to the building's future use and that statements by the Chancellor, Dean, and other officials are insignificant. *We need not delve into the University's complex internal procedures to determine who has the power to decide precise uses of the building.* The point is that there is credible and substantial evidence that UCSF's plans are reasonably foreseeable. *It is the substance of the evidence, not the source alone, that matters.*

Laurel Heights I, supra, 47 Cal.3d at 397-398, emphasis added.

In determining whether actions of the staff should be attributable to the decisionmaker, it appears reasonable to consider factors such as whether the action was by top-level management or low level staff and the degree to which the decisionmaker relies upon the staff. For example, if decisionmakers only provide review and general policy guidance or the staff has extensive authority, it would seem more reasonable to attribute the actions of the staff to the decisionmaker.

III. Methods of Avoiding, or Alternatively of Curing, Precommitment

For those advising public agencies, it appears the prudent course is to avoid the issue of precommitment altogether by providing early and comprehensive environmental review, concurrent with planning activities to the extent possible. Persuading decisionmakers that it is prudent to avoid premature statements of support for a specific project may be difficult but wise. Certainly, however, the public is going to have greater respect for the process and for the decisionmakers when it does not appear that a particular outcome is a "done deal." Also, use of program or tiered EIRs may be appropriate in situations where an agency has identified a need that must be met by implementation of some sort of a project but the agency does not yet have enough information to do a project-specific EIR.

If impermissible precommitment is found, as it was by the trial court in the *Vernon* case and the Court of Appeal in the *Albany* case, how can it be cured? A public agency which demonstrated a successful reconsideration of a project found to have been approved in violation of CEQA was the City of San Francisco in *San Franciscans v. San Francisco* (1989) 209 Cal. App. 3d 1502. There, the lead agency "began anew" the analytic process by preparing a supplemental EIR with additional data and revised projections of impacts. San Francisco's City Planning Commission had issued a building permit for an 18-story office tower in downtown San Francisco. In a stipulated judgment, the trial court issued a writ of mandate commanding the City and its agencies to vacate EIR certification and prepare a

Supplemental EIR (SEIR). *Id.* at 1509. The trial court discharged its writ after the SEIR was drafted, public comment was taken and responded to, and a final SEIR approved which included a re-analysis of cumulative impacts. *Id.* at 1511–1512. On appeal by a citizen's group, the trial court's decision was upheld. *Id.* at 1527. The Court of Appeal found *Laurel Heights I* "particularly instructive on the issue of how a public agency must approach the environmental planning and approval process the second time around when its original actions have been declared violative of CEQA." *Id.* at 1522–1523. As applied to the facts before it, the court concluded:

> We think the Commission here has discharged its duty to "begin anew" the analytic process. The Commission took a fresh look at the whole question of cumulative impacts, reviewed and considered additional data set forth in the SEIR reflecting slightly higher projection of new employees [footnote omitted], and concluded the original mitigation were sufficient.

San Franciscans at 1523.

Curing precommitment once a violation has been found is demonstrably harder than avoiding precommitment in the first instance by conducting early environmental review. An agency that has been found guilty of precommitment would have to undo each and every piece of evidence of precommitment or satisfactorily explain its failure to do so. The agency must *affirmatively demonstrate* its good faith consideration of the project's environmental impacts. *Mountain Lion Foundation v. Fish and Game Commission, supra*, 16 Cal. 4th at 134.

IV. Conclusion

CEQA was enacted in order to ensure environmental considerations would be incorporated in project planning. Since the early days of CEQA, courts have been concerned with ensuring that public agencies fairly and fully consider the environmental impacts of their decisions. While recent cases have provided greater discussion of the issue of precommitment, the treatment of the issue has by no means been definitive. No doubt, practitioners must continue to be concerned with the issue of precommitment. Generally, the most prudent course is to initiate environmental review as early as possible, which in practical terms means as soon as the general parameters of the project are sufficiently defined. Only in this way can agencies, private parties, and the public rest assured that CEQA's requirements are met.

**Jan Chatten-Brown and **Douglas Carstens served as counsel for Long Beach Heritage ("Heritage") in the case of* City of Vernon v. Board of Harbor Comrs. *(1998) _ Cal.App._, 74 Cal.Rptr. 2d 477. Although it was Heritage which raised the precommitment issue which prevailed at the trial court, Heritage settled with Long Beach prior to the completion of briefing in the Court of Appeal because the Navy and the City prepared a new Environmental Impact Statement/Impact Report, including the reuse study that Heritage had consistently sought, and the City agreed to significant new mitigation if the project went forward.*

Endnotes

1. 10 U.S.C 2687 notes; 32 C.F.R. section 175.3(a).
2. *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559.

Guest Editors' Introduction

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project for CEQA purposes, which requires a legally binding commitment to move forward with the project. The authors argue that invariably requiring a legally binding commitment to trigger an "approval" is contrary to the mandate under CEQA to "afford the fullest possible protection to the environment."

Insurance Coverage for Investigative Costs. Our final article in this Open Forum Issue is written by Chicago lawyers, Kenneth Anspach and Victoria Lynn Schaffer. Anspach and Schaffer look at whether CGL policies cover the cost of investigation of a hazardous waste site. Not surprisingly, the authors report that policyholders and insurers disagree as to the proper coverage category for investigative costs. The article looks at the different approaches courts have taken in California, Michigan, Minnesota and New Jersey, as well as the approaches of the Second and Seventh Circuits.

These articles provide a diverse mix of perspectives on a variety of environmental law issues facing practitioners. As the editors of Environmental Law News, we welcome your comments on the articles in this issue as well as suggestions for the topics to be chosen for future issues.

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