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THE RECENT RE-EMERGENCE OF CEQA'S SUBSTANTIVE MANDATE

By

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I. INTRODUCTION

The California Environmental Quality Act (CEQA)'s environmental review procedures are designed to prevent public agencies from sweeping environmental problems under the rug, and to consider alternatives and mitigation measures for a proposed project. CEQA has a substantive mandate that an agency shall not approve a project with adverse environmental impacts if feasible alternatives or mitigation measures will reduce those impacts. For many years, courts emphasized CEQA's procedural requirements, but decisions in California's courts in the past two years have brought the "substantive mandate" of CEQA to new-found prominence.

This article traces the extent to which CEQA imposes substantive obligations on California agencies.

II. THE EVOLUTION OF CEQA'S SUBSTANTIVE MANDATE FROM ITS NEPA ORIGINS

A. NEPA's Emphasis on Procedural Compliance

To understand the development of the substantive mandate of CEQA, one must understand CEQA's origins. CEQA [Pub. Res. Code § 21000 et seq.] is modeled after the National Environmental Policy Act (NEPA) [42 U.S.C. § 4321 et seq.], passed in 1969. In NEPA, Congress declared a national policy to "encourage productive and enjoyable harmony between man and his environment . . . promote efforts which will prevent or eliminate damage to the environment and biosphere . . . [and] enrich the understanding of the ecological systems and natural resources important to the Nation" [42 U.S.C. § 4321]. Such statutory pronouncements support an interpretation that NEPA imposes a substantive duty on federal agencies to study impacts and avoid environmental damage whenever it is feasible to do so. Indeed,

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several early court cases interpreted NEPA in this manner. In *Environmental Defense Fund, Inc. v. Froehlke* [(8th Cir. 1972) 473 F 2d 346, 353], for example, the court held that "NEPA requires that construction projects be completed in accordance with its substantive provisions."

However, case law quickly emerged treating NEPA as a procedural statute that does not impose substantive obligations. In the key early case of *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Com.* [(D.C. Cir. 1971) 449 F. 2d 1109], the influential D.C. Circuit held that NEPA "leaves room for a responsible exercise of discretion and may not require particular substantive results in particular problematic instances." Any lingering doubt about whether NEPA contained a "substantive mandate" was put to rest by the Supreme Court in *Kleppe v Sierra Club* [(1976) 427 US 390, 410 fn.21, 96 S. Ct. 2718, 49 L. Ed. 2d 576 ("The only role for a court is to insure that the agency has taken a 'hard look' at environmental consequences. . .")] and *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.* [(1978) 435 U.S. 519, 558, 98 S. Ct. 1197, 55 L. Ed. 2d 460 ("NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural")], *rev'd, Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.* [(1983) 462 U.S. 87, 103 S. Ct. 2246, 76 L. Ed. 2d 437].

By the late 1980s, the Supreme Court treated the lack of a substantive mandate in NEPA as self-evident. "[I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process . . . Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed-rather than unwise-agency action" [*Robertson v. Methow Valley Citizens Council* [(1989) 490 US 332, 351, 109 S. Ct. 1835, 104 L. Ed. 2d 351]]. The Ninth Circuit recently reconfirmed that NEPA is not substantive, although it did recognize that agencies are empowered to act on whatever information is contained in an EIS [*Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.* [(9th Cir. 2007) 508 F.3d 508, 546], citing *Forelaws on Bd. v Johnson* [(9th Cir. 1984) 743 F.2d 677, 683, 685]].

While some commentators assert the Supreme Court has misconstrued NEPA's original intent [*see* Madelker, NEPA Law and Litigation (2005), Thomson West, section 10.8, p. 10-26 fn. 8., and section 10.9], NEPA is now clearly interpreted as imposing only procedural mandates on federal agencies. For this reason, NEPA, and by implication many of its state counterparts, has been criticized as a "paper tiger," requiring little more than that an agency go through the motions of environmental impact review before doing what it intended all along. One critic stated that "the emphasis on the redemptive quality of procedural reform is about nine parts myth

and one part coconut oil" [Joseph L. Sax, The (Unhappy) Truth About NEPA, 26 Okla. L. Rev. 239, 239 (1973)]. However, defenders of NEPA respond that NEPA is meant to make agencies think about impacts, and its success should be measured in broad terms, beyond the outcome of any particular project decision. Thirteen years after charging that the statute was an unfortunate mixture of myth and coconut oil, Professor Sax admitted that he had "underestimated the influence of NEPA's 'soft law' elements" and that NEPA's focus on public participation and openness "has been indispensable to a permanent and powerful increase in environmental protection" [Joseph L. Sax, More Than Just a Passing Fad, 29 U. Mich. J.L. Reform 797, 804, and n.28 (1986)].

B. CEQA Diverges From Its NEPA Origins

CEQA was enacted in 1970. It has been called "the bill of rights for an environmental democracy" [Byron Sher, "CEQA: A Legislative Perspective," *Everyday Heroes Protect the Air We Breathe the Water We Drink, and the Natural Areas We Prize: Thirty-Five Years of the California Environmental Quality Act*, p. 163, Planning and Conservation League Foundation (2005)]. It contains similar introductory language to NEPA: "The maintenance of a quality environment for the people of this state now and in the future is a matter of statewide concern" [Pub. Res. Code § 21000(a)].

When the federal courts refused to find a substantive mandate under NEPA, some California courts followed the federal lead. California courts looked to case law interpreting NEPA as "strongly persuasive" authority as to the meaning of CEQA [*No Oil, Inc. v. City of Los Angeles* [(1974) 13 Cal. 3d 68, 86 fn 21, 529 P.2d 66, 118 Cal. Rptr. 34], *superseded by statute as stated in Pocket Protectors v. City of Sacramento* [(2004) 124 Cal. App. 4th 903, 21 Cal. Rptr. 3d 791]]. One California court quoted directly from *Calvert Cliffs* in refusing to find a substantive mandate in CEQA. *Hixon v. County of Los Angeles* [(1974) 38 Cal. App. 3d. 370, 382, 113 Cal. Rptr. 433] stated that NEPA, and by extension CEQA, "may not require particular substantive results in particular problematic instances."

However, soon after CEQA was enacted, the California Supreme Court laid the foundation for a vigorous substantive mandate with its early ruling that CEQA must be interpreted "in such a manner as 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, 502 P.2d 1049, 104 Cal. Rptr. 761], *superseded by statute as stated in Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* [(1997) 52 Cal. App. 4th 1165, 61 Cal. Rptr. 2d 447]]. Further, in the case of *Burger v. County of Mendocino* [(1975) 45 Cal. App. 3d 322, 327, 119 Cal. Rptr. 568] the appellate court cited *Friends of*

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Mammoth and concluded that an agency does not satisfy CEQA merely by "considering" the environmental impacts of a proposed project, but actually must reduce its significant impacts if it is feasible to do so.

Then, in 1976, the California Legislature significantly amended CEQA to provide an explicit substantive mandate, thus confirming the approach of the *Burger* court. "The Legislature finds and declares that it is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects..." [Pub. Res. Code § 21002]. The Legislature required that "each public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so" [Pub. Res. Code § 21002.1(b)].

The "substantive mandate" of section 21002 is implemented through Pub. Res. Code § 21081, which provides: "Pursuant to the policy stated in Sections 21002 and 21002.1, no public agency shall approve or carry out a project for which an environmental impact report has been certified which identifies one or more significant effects on the environment that would occur if the Project is approved or carried out unless both of the following occur: [¶] (a) ... (3) Specific economic, legal, social, technological, or other considerations ... make infeasible the mitigation measures or alternatives identified in the environmental impact report." Section 21081 thus works in tandem with section 21002 to define the conditions under which a project may be approved despite its significant adverse impacts. Unlike under NEPA, mitigation measures are required, if feasible, and must be made fully enforceable "through permit conditions, agreements, or other measures" [Pub. Res. Code § 21081.6(b)].

In the case of *Village Laguna of Laguna Beach, Inc. v. Board of Supervisors* [(1982) 134 Cal. App. 3d 1022, 1034, 185 Cal. Rptr. 41], the court emphasized that a public agency has the affirmative burden of proving that it considered a reasonable range of alternatives before it could approve a project with significant impacts, and conclusory findings of infeasibility are inadequate, implying that CEQA made substantive demands. Yet the extent to which CEQA would be a substantive statute remained unsettled. The California Supreme Court provided reason to discount CEQA's substantive mandate when it stated that environmental values could not always prevail, with no mention of feasibility being the controlling factor [*Laurel Heights Improvement Ass'n v Regents of University of California* [(1988) 47 Cal. 3d 376, 393, 764 P.2d 278, 253 Cal. Rptr. 426 ("The purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind. CEQA does not, indeed cannot, guarantee that these decisions will always be those which favor environmental considerations")].

During the 1990s, two lower courts cited the Supreme Court's *Laurel Heights* decision to conclude "CEQA is more or less a procedural scheme that makes no guarantees that environmental considerations will prevail" [*Save San Francisco Bay Ass'n v. San Francisco Bay Conservation Etc. Com.* [(1992) 10 Cal. App. 4th 908, 923, 13 Cal. Rptr. 2d 117]; *accord Concerned Citizens of South Central LA v. Los Angeles Unified School Dist.* [(1994) 24 Cal. App. 4th 826, 846, 29 Cal. Rptr. 2d 492]].

III. CEQA'S MANDATE TO AFFORD THE FULLEST POSSIBLE PROTECTION TO THE ENVIRONMENT WITHIN THE ACT'S STATUTORY LANGUAGE

A. Application of the Substantive Mandate in the 1990s

Thus, for a number of years, the substantive mandate of CEQA was present, at least in theory, but was frequently ignored in appellate court decisions. To many, CEQA was no more than a procedural statute that required certain steps to be followed, but did not have a substantive component.

In the 1990s, some courts more forcefully applied the substantive provisions of CEQA. In *Sierra Club v. Gilroy City Council* [(1990) 222 Cal. App. 3d 30, 41, 271 Cal. Rptr. 393], the court understood the key difference between NEPA and CEQA: "Unlike the 'essentially procedural' National Environmental Quality Act ..., CEQA contains substantive provisions with which agencies must comply" (internal citations omitted). In *Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* [(1994) 29 Cal. App. 4th 1597, 1601, 35 Cal. Rptr. 2d 470], the court noted that in addition to its procedural requirements, CEQA is "also intended to provide certain substantive measures for protection of the environment," citing *Friends of Mammoth*. [*See also Sierra Club v. State Bd. of Forestry* [(1994) 7 Cal 4th 1215, 1233, 876 P.2d 505, 32 Cal. Rptr. 2d 19 (CEQA compels imposition of feasible mitigation measures)].] In *Mountain Lion Foundation v. Fish & Game Com.* [(1997) 16 Cal. 4th 105, 134, 939 P.2d 1280, 65 Cal. Rptr. 2d 580], in what was apparently the Supreme Court's first use of the term "substantive mandate" in connection with CEQA, the Court stated: "CEQA's substantive mandate that public agencies refrain from approving projects for which there

are feasible alternatives or mitigation measures is effectuated in [Public Resources Code] section 21081. ([citation].) Under this provision, a decisionmaking agency is prohibited from approving a project for which significant environmental effects have been identified unless it makes specific findings about alternatives and mitigation measures. (§ 21081; *see also Environmental Council v. Board of Supervisors* (1982) 135 Cal. App. 3d 428, 439, 185 Cal. Rptr. 363)."

After *Mountain Lion*, the Supreme Court's attention again shifted away from the substantive provisions of CEQA. With the exception of *Friends of Sierra Madre v. City of Sierra Madre* [(2001) 25 Cal. 4th 165, 19 P.3d 567, 105 Cal. Rptr. 2d 214], the Supreme Court did not address CEQA's substantive mandate between 1997 and 2006, though it occasionally dealt with procedural aspects of CEQA during that time. [*See*, for example, *Sierra Club v. San Joaquin Local Agency Formation Com.* [(1999) 21 Cal. 4th 489, 981 P.2d 543, 87 Cal. Rptr. 2d 702 (dealing with administrative exhaustion requirements)] and *ex rel. Dept. of Conservation v. El Dorado County* [(2005) 36 Cal. 4th 971, 116 P.3d 567, 32 Cal. Rptr. 3d 109 (dealing with standing)]. With the Supreme Court again focused on CEQA procedure, the implementation of CEQA's "substantive mandate" remained a hit or miss proposition in the appellate courts.

B. CEQA's Substantive Mandate Is Forcefully Applied by the California Supreme Court in 2006 and 2007

The substantive mandate of CEQA received new vitality in 2006. In a harbinger of the Supreme Court's *City of Marina* decision discussed below, the court of appeal discussed the "substantive mandate" of CEQA in *County of San Diego v. Grossmont-Cuyamaca Community College Dist.* [(2006) 141 Cal. App. 4th 86, 45 Cal. Rptr. 3d 674]. In that case, a community college district prepared a master plan EIR that identified significant off site traffic impacts from a proposed expansion. The district prepared a Statement of Overriding Considerations pursuant to Pub. Res. Code § 21081 that claimed mitigation for offsite traffic was infeasible because traffic mitigation at offsite locations was under the jurisdiction of other agencies. The court disagreed, reasoning that "CEQA contains a substantive mandate" [*Grossmont-Cuyamaca*, 141 Cal. App. 4th at 98] and that the district would therefore need to support any claim of infeasibility of mitigation with substantial evidence, rather than the say-so of the agency.

One month after *Grossmont-Cuyamaca* was decided, and without mentioning *Grossmont-Cuyamaca*, the Supreme Court articulated a rigorous test for determining when adverse effects on the environment could go unmitigated, in *City of Marina v. Board of Trustees of California State University* [(2006) 39 Cal. 4th 341, 368-369, 138 P.3d 692, 46 Cal. Rptr. 3d 355]. In *City of Marina*, the Board of Trustees of the California State University argued that it was infeasible to mitigate the impacts of the expansion of a state university campus at a former military base. The federal government had transferred ownership of a former military base to the state, and the state had set up an agency to guide the redevelopment. The California Sate University (CSU) system located on the site and developed plans for a large new campus, eventually enrolling 25,000 students. CSU prepared an EIR that found numerous significant impacts from the expansion, including traffic impacts both on and offsite. CSU took the position that mitigation of offsite traffic was infeasible, because CSU could not legally contribute money for offsite mitigation, and that such mitigation was the responsibility of the agency overseeing the redevelopment. The Supreme Court rejected CSU's contention that it could not legally contribute money for offsite mitigation. Thus, CSU had failed to mitigate impacts by refusing to fund traffic mitigation by the agency overseeing the redevelopment of the former base:

> CEQA does not authorize an agency to proceed with a project that will have significant, unmitigated effects on the environment, based simply on a weighing of those effects against the project's benefits, unless the measures necessary to mitigate those effects are truly infeasible. Such a rule, even were it not wholly inconsistent with the relevant statute (id., § 21081, subd. (b)), would tend to displace the fundamental obligation of "[e]ach public agency [to] mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so" (id., § 21002.1, subd. (b)).

The year following *City of Marina*, the Supreme Court addressed the spirit with which an agency must approach CEQA, stressing that the law is more than a mere set of procedural provisions, but rather promotes understanding of environmental consequences of proposed projects and ways to mitigate those consequences:

> The preparation and circulation of an EIR is more than a set of technical hurdles for agencies and developers to overcome. The EIR's function is to ensure that government officials who decide to build or approve a project do so with a full understanding of the environmental consequences, and, equally important, that the public is assured those consequences have been taken into account.

[*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* [(2007) 40 Cal. 4th 412, 449–450, 150 P.3d 709, 53 Cal. Rptr. 3d 821]].

The Supreme Court clarified the principle that judicial review of agency decisions for compliance with the legal requirements of CEQA is not always subject to the deferential substantial evidence standard [*Vineyard Area Citizens*, 40 Cal. 4th at 435]. It found that, among other failings, the City of Rancho Cordova did not require "enforceable mitigation measures for the surface water diversions" and so it failed to proceed in a manner required by CEQA [40 Cal. 4th at 444].

C. Post-City of Marina Appellate Decisions

Within the past two years, several court of appeal decisions have emphasized the need to mitigate impacts or pursue alternatives before proceeding to an examination of the benefits of a project that might support a finding of overriding considerations. Most of these cases involved flawed alternatives analyses. Since the Supreme Court has made it clear that "alternatives are a type of mitigation" [*Laurel Heights*, *above*, 47 Cal 3d at 403], these cases speak directly to the substantive requirement under CEQA to mitigate adverse environmental impacts.

Two months after the Supreme Court decision in *City of Marina*, a court of appeal struck down the City of San Jose's approval of a project proposing redevelopment of a historic property because mitigation of its significant impacts was not shown to be infeasible. In *Preservation Action Council v City of San Jose* [(2006) 141 Cal App 4th 1336, 46 Cal. Rptr. 3d 902], the defendant city relied heavily on the real parties' project objectives, which included specifications for size (162,000 square feet) and layout (a one storey rectangular building of 22 feet in height) of the Lowe's Home Improvement Center [*Preservation Action Council v City of San Jose* 141 Cal. App. 4th at 1344]. The EIR rejected a smaller alternative that would have met all project objectives except for size, and would have allowed for preservation of an historic building on site [141 Cal. App. 4th at 1355]. The court found that to justify the rejection of this smaller alternative, the city would have to find that the smaller alternative either "would be more expensive to build and stock or that the reduced size alternative would be operationally infeasible" [141 Cal. App. 4th at 1356]. Finding that the city had failed to meet this test, the court agreed with a commenter that "the project objectives in the DEIR appear unnecessarily restrictive and inflexible" [141 Cal. App. 4th at 1360]. Due to the narrowness of project objectives, mitigating the adverse impact of the proposed project by such means as alternative project designs was impermissibly constrained.

Six months after *City of Marina*, in *Uphold Our Heritage v. Town of Woodside* [(2007) 147 Cal. App. 4th 587, 54 Cal. Rptr. 3d 366], the court expressly rejected the Town of Woodside's attempts to use a narrow project objective to limit the range of feasible alternatives in another case involving an historic structure. The EIR defined the project objective as "clearance of the primary home and cottage from the site ... to prepare the site for the eventual construction of a single family residence." The EIR studied five alternatives to demolition, four of which involved retaining the historic mansion [*Uphold Our Heritage v. Town of Woodside*, 147 Cal. App. 4th at 593].

The town argued that by definition, the EIR should not have even considered alternatives that did not include demolition, since demolition was included as a project objective. The court rejected the attempt to use narrow project objectives to restrict the range of alternatives, and instead recast the objectives in much broader terms, as a project involving development of a single family home on the property [147 Cal. App. 4th at 595, fn. 4].

The appellants made a similar argument about feasibility, claiming that since the applicant wanted to demolish the existing mansion that any alternative involving preservation of the mansion was by definition infeasible. The court roundly rejected such a narrow reading of feasibility, and implicitly, the narrow project objectives that underlay the determination of infeasibility: "The willingness of the applicant to accept a feasible alternative, however, is no more relevant than the financial ability of the applicant to complete the alternative. To define feasible as appellants suggest would render CEQA meaningless" [147 Cal. App. 4th at 601]. Significantly, the court in Uphold Our Heritage specifically referred to the portion of *City of Marina* holding that mitigation measures must be "truly infeasible" before a public agency may approve a project with significant impacts [147 Cal. App. 4th at 603].

Save Round Valley Alliance v. County of Inyo [(2007) 157 Cal. App. 4th 1437, 70 Cal. Rptr. 3d 59] continues this trend, citing *Uphold Our Heritage* [157 Cal. App. 4th at 1460, fn. 10, 1462] and *Preservation Action Council* [157 Cal. App. 4th at 1457, 1458, 1461]. *Save Round Valley* deals with the extent to which the economic goals of a real party in interest can affect the scope of the alternatives analysis and ultimate determination of feasibility of alternatives studied in an EIR. *Save Round Valley* involved the proposed development of a single family residential subdivision on a remote, mountainous, and undeveloped site at the foot of Mt. Whitney. At issue was whether the desire of a project proponent for a subdivision with an expansive view and proximity to running water would render infeasible an alternative that consisted of a land swap with a federal agency and development of the subdivision at another, less sensitive location. The proponent found the

alternative site less desirable because it lacked the desired views and proximity to running water, and he indicated his unwillingness to participate in a land swap. Especially noteworthy, the court repeated the principle highlighted in *Uphold Our Heritage* that "the willingness or unwillingness of a project proponent to accept an otherwise feasible alternative is not a relevant consideration" [*Save Round Valley*, 157 Cal. App. 4th at 1460, fn. 10 ("That is, although the Planning Commission and the Board cannot compel Walters to accept a land exchange, they can withhold their approval of the proposed subdivision if he does not agree to the exchange")].

The court of appeal ruled that notwithstanding the proponent's stated unwillingness to exchange his land, the EIR should have analyzed the land swap alternative. The court stated quite simply that an "applicant's feeling about an alternative cannot substitute for the required facts and independent reasoning" [157 Cal. App. 4th at 1458, quoting *Preservation Action Council*, 141Cal. App. 4th at 1356], and that "the agency preparing the EIR may not simply accept the proponent's assertions about an alternative" [157 Cal. App. 4th at 1460].

IV. WHAT TEST WILL BE APPLIED IN REVIEWING DETERMINATIONS OF INFEASIBILITY AND STATEMENTS OF OVERRIDING CONSIDERATIONS?

CEQA's substantive mandate is clearly evident in post-*City of Marina* case law. Whether agencies will try to impermissibly avoid CEQA's substantive mandate is likely to emerge as one of the next battlegrounds in CEQA case law. If an agency finds that there are not feasible mitigation measures or alternatives, it may nonetheless approve a project with adverse impacts by adopting a Statement of Overriding Considerations, if it finds that "specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment" [Pub. Res. Code § 21081(b)]. Some public agencies improperly skip right to the step of weighing project benefits against project impacts, without meaningfully exhausting the necessary step of determining whether mitigation measures or alternatives are truly infeasible. Does the use by the California Supreme Court of the term "truly infeasible" [*City of Marina*, 39 Cal. 4th at 368] and the requirement for an agency to "affirmatively demonstrate[e] 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*, *above*, 16 Cal. 4th at 134] mean that the Supreme Court will apply a more rigorous standard to determinations of infeasibility rather than simply look to see if there is substantial evidence to support a finding of infeasibility?

There is relatively little case law directly addressing the judicial review of the evidentiary support for Statements of Overriding Considerations ("Statements"). The cases to date suggest that agencies must base their Statements on evidence at least as solid as the evidence needed to support the adequacy of an EIR, and that courts will review Statements much like they will review the EIRs on which the Statements are based. It also appears that courts will take a dim view of using the Statement to evade other requirements of CEQA.

The Statement must be supported by substantial evidence in the EIR or elsewhere in the record [*Sierra Club v. Contra Costa County* [(1992) 10 Cal. App. 4th 1212, 1223, 13 Cal. Rptr. 2d 182]]. The say-so of the project proponent does not constitute substantial evidence supporting a finding that a reduced build alternative is infeasible [*Preservation Action Council*, *above*, 141 Cal. App. 4th at 1356]. The Statement, like the EIR itself, must make a "good faith effort to inform the public," and a Statement based on false or misleading comparisons among alternatives is legally inadequate [*Woodward Park Homeowners Assn., Inc. v City of Fresno* [(2007) 150 Cal. App. 4th 683, 58 Cal. Rptr. 3d 102]]. A Statement of Overriding Considerations allows a project with impacts to go forward, "but only after the elected decision makers have their noses rubbed in those environmental effects, and vote to go forward anyway [*Woodward Park Homeowners Assn., Inc. v City of Fresno*, 150 Cal. App. 4th at 720, quoting *Vedanta Society of So. California v. California Quartet, Ltd.* [(2000) 84 Cal App 4th 517, 530, 100 Cal. Rptr. 2d 889]].

In applying the substantial evidence test to the Statement of Overriding Considerations, a court, in theory, must give "much deference" to an agency's balancing of project benefits and environmental impacts reflected in the Statement [*Uphold Our Heritage*, 147 Cal. App. 4th at 603, quoting *City of Marina*, 39 Cal. 4th at 368]. However, the agency is only entitled to this deference after it demonstrates that mitigation measures are "truly infeasible" [*City of Marina*, 39 Cal. 4th at 368]. Therefore, in practice the courts that have evaluated Statements of Overriding Considerations have rigorously reviewed findings regarding alternatives and mitigation measures, as cases like *Uphold Our Heritage* and *Woodward Park* make clear. Courts are more deferential when it comes to reviewing the balancing of benefits claimed by public agencies. [*See Sierra Club v. Contra Costa County*, *above*, 10 Cal. App. 4th at 1223].

IV. CONCLUSION

Throughout its history, California courts have stressed the importance of complying with the procedural requirements of CEQA. However, in reviewing CEQA claims, a court must "determine de novo whether the agency has employed the correct procedures, 'scrupulously enforc[ing] all legislatively mandated CEQA requirements' " [*Vineyard Area Citizens*, *above*, 40 Cal. 4th at 435]. Among CEQA's legislatively mandated requirements is its substantive requirement to avoid or substantially lessen the significant effects of proposed projects. As *Vineyard Area Citizens* and *City of Marina* help make clear, procedure and substance work in tandem to assure that CEQA realizes its promise to provide for "a quality environment for the people of this state now and in the future" [Pub. Res. Code § 21000(a)].

This emphasis on CEQA's substantive mandate in California contrasts sharply to the now-settled federal interpretation of NEPA as purely procedural. Several other states have made their versions of NEPA substantive. [*See, e.g.*, Wash. Rev. Code. Ann. § 43.21C.060; N.Y. Envtl. Conserv. Law § 8-0109(8); Mass. Gen. Law. ch. 30 § 61.] With the change in control of Congress in 2006, the impending change in administration next year, and the sense of urgency about dealing with problems such as climate change, proposals to add an explicit substantive mandate to NEPA may have more traction than in years past. If such reform is implemented, the evolution of NEPA and CEQA will have come full circle since the 1970s, with California providing a useful statutory example and judicial interpretations for an information-forcing environmental protection statute that also makes substantive demands on how agencies use the information.

With the rapidly expanding population of California, impacts of ever-increasing development pressures have grown in their severity. Impacts in areas such as air quality, biological resources, water supply, and traffic often are analyzed in a setting where there is a severely strained situation already. Therefore, the imposition of every feasible mitigation measures on projects that have significant impacts as required by CEQA is imperative if the quality of life in California is to be protected against further degradation. Recent case law demonstrates that CEQA's substantive mandate to minimize the environmental impacts of proposed projects is more vibrant than ever.

THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

Cases

SCAQMD Abused Discretion in Using Maximum Permitted Emissions As Baseline

Communities for a Better Environment v. South Coast Air Quality Management Dist.
No. B193500, 2d Dist., Div. 2
158 Cal. App. 4th 1336, 2007 Cal. App. LEXIS 2145
December 18, 2007, cert. for part. pub. January 16, 2008

The South Coast Air Quality Management District abused its discretion in issuing a negative declaration in connection with the modification of a diesel fuel production plant because plaintiffs offered substantial evidence supporting a fair argument that the project's nitrogen dioxide emissions may have a significant effect on the environment. In finding no significant effect, the SCAQMD improperly relied on a baseline level of permitted emissions that did not reflect existing physical conditions.

Facts and Procedure. This action was brought by an individual who resided in Wilmington near the Conoco-Phillips refinery in Wilmington CA, by labor organizations with members who lived and/or worked in Wilmington and throughout the South Coast Air Basin, and by Communities for a Better Environment, a nonprofit environmental organization whose goals include protecting and enhancing the environment and public health by reducing air pollution in California's urban areas. Defendant Conoco-Phillips is the largest petroleum refiner in the United States. Its Los Angeles refinery operates at two different sites in the South Coast Air Basin (the Wilmington plant and the Carson plant). The Wilmington plant consists of approximately 400 acres bordering commercial, recreational and residential areas. It produces a variety of products including gasoline, jet fuel, diesel fuel, petroleum gases, sulfuric acid, and sulfur.

In January 2001, the US EPA published rules on diesel fuels standards requiring that by June 1, 2006, refiners had to begin selling highway diesel fuel meeting a maximum sulfur standard of 15 parts per million by weight (ppmw) [40 C.F.R. § 80]. The deadline corresponded with the EPA requirement that by 2007 all on-road, diesel-fueled vehi-