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Conflicting Statutes in No-Growth Environments: CEQA and the PSA

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I.

INTRODUCTION

Environmental review of a proposal is governed by two conflicting statutes in California law. These statutes represent and protect opposing interests, one of which is continuing to dominate the other despite legislative attempts at a balance. The older of the two statutes, the California Environmental Quality Act (CEQA),¹ requires thorough analysis of the environmental effects of a project before action can be permitted by any agency. The newer statute, the California Permit Streamlining Act (PSA),² was enacted by the California legislature in 1977 as a reaction to a series of embarrassing government delays and abuses in the efforts of Dow Chemical Company to obtain permits for a project in northern California.³ The fundamental mandate of the PSA is that an agency to which an applicant has applied for a permit must act on that permit application within one year of the date the application is deemed complete.⁴ CEQA provides numerous opportunities for delay. It

1. CAL. PUB. RES. CODE §§ 21000-21177 (West 1985). CEQA was enacted in 1970. Compare the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370 (1982).

2. CAL. GOV'T CODE §§ 65940-65946 (West 1985).

3. See C.J. DUERKSEN, *DOW VS. CALIFORNIA: A TURNING POINT IN THE ENVIROBUSINESS STRUGGLE* (1982). Dow Chemical Company announced plans in February, 1975, to construct a large petrochemical complex northeast of San Francisco. In January, 1977, Dow announced the cancellation of the project because of environmental and regulatory impediments. See especially 114-16.

For another view of the general problem of administrative inaction, see Lehner, *Judicial Review of Administrative Inaction*, 83 COLUM. L. REV. 627 (1983). Lehner's article concerns federal agencies and advocates judicial activism to solve the problem of agencies that do not promulgate or employ their regulations as required by Congress.

4. CAL. GOV'T CODE § 65950. If the agency fails to act, the application is automatically deemed approved, which is perceived as a severe enough penalty in California that it encourages agencies to act within one year. CEQA calls for completion of an EIR within one year but only by mandating regulations; it does allow for delay. CAL. PUB. RES. CODE § 21100.2.

establishes the process for environmental review of a project and the means for voiding any permit issued without strict adherence to that process.

Quite clearly, the two laws operate at cross purposes: CEQA insists upon thorough analysis of all environmental effects of a project, as well as consideration of the alternatives to the project; PSA insists upon a prompt decision on the application. The PSA was enacted as a sort of developers' backlash against CEQA which has been the safe harbor of the California environmental protection movement. The gaps and overlaps between the two laws, and the extreme difficulty of implementing the two harmoniously are generating important cases that the courts will have to resolve. Other states, which will doubtless feel the same pressures to enact PSA-type legislation as California did, should heed the warning signals and resolve the controversies before codifying the dispute.⁵ The California example is not impressive.

Most states and localities encourage the growth of "clean" industry within local boundaries. The economic rewards in underemployed areas are popular; the environmental costs are few. On the other hand, polluting industry is far less desirable regardless of the economic gains available. In areas where growth is undesirable, neither variety of industrial newcomer is welcome, and in areas concerned with environmental protection, the latter type is generally under attack. Environmental protection laws such as CEQA provide a series of procedural hurdles to be overcome by an applicant proposing any project. These procedures are rich in opportunities for abuse by those opposing the project. Where the applicant seeks permits from an agency which disfavors the project or fears lack of adequate control,⁶ the agency, under the aegis of the statute mandating thorough examination of environmental effects of projects, can abuse the environmental process.

5. Few other jurisdictions have time limits on project approvals. *But see* *Norco Construction, Inc. v. King County*, 97 Wash. 2d 680, 649 P.2d 103 (1982) in which the Washington Supreme Court refused to allow a county to defer action on a subdivision project beyond the statutory time period because the project was not in conformity with proposed changes in the county's comprehensive plan. (The court also held that such grounds were impermissible for the county even within the statutory time period.) Washington "adheres to the minority rule that a landowner obtains a vested right to develop land when he or she makes a timely and complete permit application that complies with the applicable . . . ordinances . . ." *Id.* at 684, 649 P.2d at 106.

The *Norco* case provides some useful discussion of the importance of time limits on permit decisions, citing cases of abuse in other states. *Id.* at 686, 649 P.2d at 107.

6. *See infra* note 52.

II.

CEQA AND PROJECT DELAY

CEQA's stated purpose is significant and familiar — to prevent destruction of the environment by means of analysis and necessary mitigation of the environmental impacts of proposed projects.⁷ Typically, an applicant submits an application to develop land in a certain way. The application will eventually be deemed complete⁸ by the agency,⁹ and the need for an environmental impact report (EIR) is then determined. Assuming that an EIR is necessary, which is almost always the case where large real estate developments are concerned, the agency determines the scope of the EIR and generally offers the project to consulting firms for bids on the job, the cost payable by the applicant.¹⁰ CEQA requires only that an EIR be prepared; but the jurisprudential standards of EIR scrutiny have become so stringent that most projects require the time and expertise of specialists that government agencies are unable to provide.¹¹

The CEQA process, by its very nature, is time consuming and expensive, but the legislature considered protection of the environment to be important enough that the public should absorb the

7. See CAL. PUB. RES. CODE §§ 21000-21001. CEQA requires that public agencies not approve projects if there are alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of a project. *Id.* § 21002. Accordingly, an agency must prepare an EIR for any project unless an exemption is available. The exemptions are: (1) that the activity is not a "project" within the meaning of CEQA; (2) that there is a statutory exemption, and (3) that the activity falls under the general rule that CEQA applies only to projects having a potential to cause a significant effect on the environment. CEQA Guidelines, CAL. ADMIN. CODE tit. 14, R.83, § 15061 (1983).

On the definition of a "project" and general requirement for an EIR, see *Wildlife Alive v. Chickering*, 18 Cal.3d 190, 553 P.2d 537, 132 Cal. Rptr. 377 (1976); *Bozung v. Local Agency Formation Commission of Ventura County*, 13 Cal.3d 263, 529 P.2d 1017, 118 Cal. Rptr. 249 (1975); *Friends of Mammoth v. Board of Supervisors of Mono County*, 8 Cal.3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972).

8. See *infra* note 23 and accompanying text on the time for determination of completeness of an application.

9. On the issue of lead agencies and responsible agencies, see *infra* notes 29-31 and accompanying text.

10. This is a point in the process where the applicant and the agency should work in tandem, and closely with the contractor. Inaccuracies result from distrust in the early stages of the environmental review process.

In many jurisdictions in California, e.g. Los Angeles County, and in other states, environmental review documents are prepared by the applicant, then reviewed, analyzed etc. by the agency. Note that in the Dow crisis, one of the first under the newly enacted CEQA, this procedure was not fully followed. See *DUERKSEN, supra* note 3, at 33. See also *infra* note 39 and accompanying text. *But see infra* note 52.

11. CAL. PUB. RES. CODE § 21089; CAL. ADMIN. CODE tit. 14, R.83 § 15045.

costs of such delays. A critical difference between CEQA and the National Environmental Policy Act (NEPA), which accounts for a large part of the delay and complexity of the process, is the CEQA requirements regarding alternatives to the project. The viable alternatives must not only be considered but also explained when they are deemed superior though rejected in favor of the project as proposed.¹² Similarly, mitigation measures identified in the EIR must be employed unless it would be infeasible to do so.¹³ "Feasible" is defined in CEQA as "capable of successful accomplishment within a reasonable period of time, taking into consideration economic, environmental, social, and technological factors."¹⁴

Delay is a technique of permit denial. As the *Norco* court stated, "[u]nreasonable delay . . . may be just as much an exclusionary zoning plan. . . ."¹⁵ The *Norco* court attacked the abuse of land use control powers, further noting that contract zoning verges on overreaching by local officials to "extract extra-legal concessions from developers. . . ."¹⁶

CEQA provides ample opportunity for delay by allowing the agency to claim that yet another alternative must be investigated thoroughly or that an environmental fact has been uncovered which must be studied. Under the aegis of CEQA, agencies can continue to force developers into expensive delays which become intolerable, and therefore "defensible" victories for the community which does not want the development for some less protected reason.

An important case for proponents of delay in the environmental review process is *Sutter Sensible Planning, Inc. v. Board of Supervisors*,¹⁷ in which the California Court of Appeal held that a revised EIR must be recirculated for public and agency comment if it contains significant new information. In Sutter County, California, Sutter Tomato Products, Inc. proposed to construct a tomato processing facility for which a conditional use permit was sought. The draft EIR was revised to include new information such as

12. CAL. PUB. RES. CODE §§ 21002, 21081; 42 U.S.C. § 4332.

13. CAL. PUB. RES. CODE at § 21002.1.

14. *Id.* § 21061.1.

15. *See Norco Construction, Inc. v. King County*, 97 Wash. 2d 680, 685, 649 P.2d 103, 106 (1982).

16. *Id.* at 686, 649 P.2d at 107. *See also Delogu, The Misuse of Land Use Control Powers Must End: Suggestions for Legislative and Judicial Responses*, 32 ME. L. REV. 29 (1980). Delogu strongly criticizes the erosion of constitutionally protected property rights by the broadening concept of police power. Although he lists several familiar exclusionary zoning techniques, he fails to note or discuss the emerging abuse of environmental procedures to the exclusionary end.

17. 122 Cal. App. 3d 813, 176 Cal. Rptr. 342 (1982).

quantities of pesticide residues to be expected in the waste water, further discussion of ground water availability and the water table and more data on traffic.¹⁸ The court found that CEQA¹⁹ requires recirculation of the EIR when such new information is added.²⁰ The *Sutter* court stated that it realized its decision would delay the project but that the court could not allow "such considerations to eviscerate the fundamental requirement of public and agency review. . . ."²¹

III.

THE PERMIT STREAMLINING ACT AND DELAY

As noted above, the Permit Streamlining Act was passed by the California legislature in 1977, in response to at least one embarrassing permit fiasco in which a major corporation became outraged and withdrew entirely from the State of California.²²

The basic mechanics of the PSA are quite simple. There are two critical dates in the life of a permit application in California: the date it is deemed complete, and the date it is acted on by the agency. The PSA requires all state agencies to have lists of criteria against which applications will be measured for completeness.²³ Once a permit application is submitted, the agency has up to thirty days to deem the application complete or to specify, in writing, its deficiencies. Importantly, failure of the agency to do either within thirty

18. *Id.* at 817-18, 176 Cal. Rptr. at 344.

19. CAL. PUB. RES. CODE § 21166 states: When an environmental impact report has been prepared for a project pursuant to this division, no subsequent or supplemental environmental impact report shall be required by the lead agency or by any responsible agency, unless one or more of the following events occurs: (a) substantial changes are proposed in the project which will require major revisions of the environmental impact report, (b) substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report, (c) new information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.

20. The court analogizes the NEPA requirement that supplements be circulated. 122 Cal. App. 3d at 822, 176 Cal. Rptr. at 347 citing *Natural Resources Defense Council v. Callaway*, 524 F.2d 79, 92 (2d Cir. 1975); *Alaska v. Carter*, 462 F. Supp. 1155, 1162 (D. Alaska 1978); *Appalachian Mountain Club v. Brinegar*, 394 F. Supp. 105, 121-122 (D.N.H. 1975); 23 C.F.R. § 1.38 (1974).

21. 122 Cal. App. 3d at 823, 176 Cal. Rptr. at 348.

22. *See supra* note 3 and accompanying text. The PSA has been the subject of almost no litigation. One meaningful case, *Landi v. County of Monterey*, 139 Cal. App. 3d 934, 189 Cal. Rptr. 55 (1983), held that legislative acts such as a rezoning decision are not subject to the PSA.

23. CAL. GOV'T CODE §§ 65940-65942.

days results in automatic "completeness" of the application.²⁴

Next, the statute forbids an agency to seek new or additional information from the applicant after the application has been deemed complete. (The agency is permitted, however, to request clarifying or correcting material after that time.)²⁵ The statute goes on to preclude an interpretation allowing the agency to use the completeness process as a time for gathering all the information necessary for final agency action on the permit application.²⁶ It does not allow interpretation preventing the agency from requesting information necessary for CEQA.²⁷ These two provisions balance one another, leaving the applicant and agency in a state of confusion.

Before analyzing the scheme for approvals or denials of completed applications, it is essential to understand the categories of agencies involved. In almost every instance in California, a large project requires numerous permits from equal numbers of agencies.²⁸ The PSA and CEQA acknowledge a "lead" agency for a project,²⁹ which is the agency having the principal responsibility for carrying out and approving the project.³⁰

All other agencies with permit jurisdiction over the project are called "reponsible" agencies.³¹ The PSA allows the lead agency no more than one year after the application is deemed complete to act on it.³² Each responsible agency must grant or decline to issue its permit within 180 days from the date the lead agency acts, or within 180 days from the date that the responsible agency deems the application submitted to it to be complete, whichever is longer.³³

As enacted originally, the PSA allowed one time extension to the

24. *Id.* § 65943.

25. *Id.* § 65944(a). This is obviously an effort to cut off the gathering of raw data. As discussed below, however, this provision of the law receives limited respect in practice.

26. *Id.* § 65944(b).

27. *Id.* § 65944(c).

28. One serious problem in the PSA is that it fails to contemplate that one agency may be responsible for more than one permit on a single project. *See infra* note 31 and accompanying text.

29. CAL. PUB. RES. CODE § 21067; CAL. ADMIN. CODE tit. 14, R.83 §§ 15050-15053.

30. CAL. PUB. RES. CODE § 21067.

31. *Id.* § 21069. Although the statute contemplates more than one lead agency, agencies can and do, by written agreement, function as co-lead agencies on a project. Among the advantages of being a lead agency is the ability to charge the applicant a fee for the time spent by agency staff on the project, which can be considerable. *See, e.g.* CAL. ADMIN. CODE tit. 14, § 15045.

32. CAL. GOV'T CODE §§ 65950, 65953.

33. *Id.* §§ 65952, 65953.

permit deadline, not to exceed ninety days, so long as both the agency *and* the applicant agreed.³⁴ In 1983, however, the PSA was amended to provide that, if there has been a time extension for completion of the project EIR, then the PSA allows ninety days beyond certification of that document for a permit decision.³⁵ In addition, the original ninety day extension provision was amended so as to attach itself to the new ninety day extension section, thus allowing an agency to obtain certification of the EIR plus 180 days for its decision under the PSA. The practical although not clearly intended effect of the amendments is to put CEQA in control and to make the PSA into a sort of cleanup statute preventing outrageous delay for reasons *not* associated with CEQA.

CEQA, however, provides many legitimate means for an agency to seek or demand more time, which has become common practice in some jurisdictions where no-growth is a strong goal.³⁶ Because most of the CEQA jurisprudence virtually requires that the benefit of the doubt be resolved against the development and in favor of the natural environment, the PSA can now be asked to stand in line behind the already institutionalized delays.³⁷

IV.

THE KOLLSMAN CASE

There has been one published case involving the overlap of these two statutes, *Kollman v. Los Angeles*.³⁸ Although the case certainly does not turn on the problems of CEQA versus the PSA, the

34. *Id.* § 65957. In the case of a federal/state EIS/R, the time is 60 days. *Id.* § 65951.

35. *Id.* § 65950.1. The EIR time extension derives from CAL. PUB. RES. CODE §§ 21100.2 and 21151.5, which require applicant consent. If, however, the applicant refuses to grant more time, the agency is on stronger ground in denying the permit. A waiver can be easily extracted from a developer against such a threat. *See infra* note 55 and accompanying text.

36. *See infra* notes 47-57 and accompanying text on the Santa Barbara County disputes with the oil industry.

37. On the adequacy of an EIR, see CAL. PUB. RES. CODE §§ 21002, 21002.1, 21003, 21061, 21080, 21083.5, 21083.7, 21100, 21101, 21154, 21166, 21167 2, 21167 3, CAL. ADMIN. CODE tit. 14, R.83 §§ 15003, 15061, 15140-15151, 15202; *Woodland Hills Residents Assoc., Inc. v. City Council of Los Angeles*, 26 Cal. 3d 938, 609 P 2d 1029, 164 Cal. Rptr. 255 (1980); CEQA imposes page limits for EIRs, but successfully undermines that very restriction by allowing unlimited technical appendices, and unlimited numbers of drafts, each requiring recirculation to the public if substantial new information is included. *See CAL. PUB. RES. CODE* § 21166; CAL. ADMIN. CODE tit. 14, R.83 § 15142; and *Sutter Sensible Planning, Inc. v. Sutter County*, 122 Cal. App. 3d 813, 176 Cal. Rptr. 342 (1981). *See infra* note 55 and accompanying text.

38. 565 F. Supp. 1081 (C.D. Cal. 1983) *rev'd* 737 F.2d 830 (9th Cir. 1984)

PSA rights of an applicant were finally discussed by a court with disappointing results and little guidance for the future.

In January, 1977, the plaintiff, Mr. Kollsman, applied to the City of Los Angeles for permits to develop his land as a housing subdivision. In addition to his application, as required by the city, he submitted an environmental assessment.³⁹ Shortly thereafter, the City advised Kollsman that his application was not complete and that he was required to submit a draft EIR. He did this approximately six months later. The City then advised Kollsman that the EIR was incomplete, so Kollsman submitted a second draft in September, 1977. After public review of Kollsman's second draft, the City advised him that it required still more information, specifically including further discussion of an alternative utilizing "cluster homes" rather than the units Kollsman planned.⁴⁰ In March, 1978, Kollsman submitted additional information but nothing on cluster homes because he had no interest in employing such an alternative to his project.

In May, 1978, therefore, the City advised Kollsman that his draft EIR could not be considered complete without information on this alternative, which he refused to provide. Finally, in November, 1978, nearly two years after he filed the application, it was formally deemed incomplete by the city. Two months later he received a notice refusing public hearing on the project for lack of a complete EIR and in November, 1979, he received a letter disapproving the project because of his failure to provide the requested information.

The litigation which ensued was brought by Kollsman in federal district court, under diversity and federal question jurisdiction, attacking the City's policies on constitutional grounds and alleging state law claims. Kollsman also raised the issue of the PSA right to have his application deemed approved. The district court enforced that right, finding his application was approved effective November 22, 1978, because it was found to have been deemed complete one year earlier, and because the City took no action in the interim.⁴¹ The Ninth Circuit vacated the district court's decision on the

39. Los Angeles requires that an applicant submit a draft EIR which the City then evaluates and analyzes. See City of Los Angeles EIR Guidelines, art. VI, § 2e. The CEQA guidelines allow for such a process. See CAL. PUB. RES. CODE § 21160 and CAL. ADMIN. CODE tit. 14, R.83 § 15084(e).

40. The cluster alternative was required by the City on the basis of the slope density formula for the community plan, pursuant to the general plan. See CAL. GOV'T CODE § 65302.

41. 737 F.2d at 831-33.

grounds of the abstention doctrine.⁴²

The dissenting Circuit Court Judge Reinhardt saw no basis for abstention. Rather, he would have reversed the decision below on the merits of the state law questions and remanded the constitutional questions to the district court for decision.⁴³ Judge Reinhardt stated that it was inappropriate for the district court to find Kollsman's application to have been deemed *complete* under state law, therefore making impossible any decision that it was deemed approved.⁴⁴

The *Kollsman* facts raise important questions, including whether it is appropriate or equitable under CEQA for an agency, delegating to the applicant the responsibility for preparing the project EIR in the first place, to use the EIR as a means of demanding continuous changes in the project and thereby avoid deeming the application complete. Second, and analogously, is it appropriate to use the "completeness" process as an opportunity for delay? In other words, how much information is enough to deem an application complete?

The California courts have ruled in many cases on the adequacy of the information on the EIR itself.⁴⁵ The collective jurisprudence liberally calls for large quantities of information, but not every shred of data available is required for the decision-maker to make an informed decision.⁴⁶ The PSA, however, imposes a time limit on how much information can be gathered where the law does not otherwise set a point beyond which it is unfair or unnecessary to study a project. The *Kollsman* case brought to the courts the recent practice of California agencies in no-growth environments responding in frustration to the PSA, which is to delay as long as possible before deeming an application complete.

The decision in *Kollsman* is disappointing in that the court failed to take the strong approach of the *Norco* court. A ruling giving meaning to the PSA is essential if the statute is to have any effect in preventing governmental abuse of the environmental process.

42. *Id.* at 837.

43. *Id.* at 837-44 (Reinhardt, J., dissenting).

44. *Id.* at 838.

45. *See, e.g.*, *Inyo v. Los Angeles*, 124 Cal. App. 3d 1, 177 Cal. Rptr. 479 (1981); *Carmel-by-the-Sea v. Board of Supervisors*, 71 Cal. App. 3d 84, 139 Cal. Rptr. 214 (1977); *People v. County of Kern*, 62 Cal. App. 3d 761, 133 Cal. Rptr. 389 (1976)

46. *See, e.g.*, *City of Del Mar v. City of San Diego*, 133 Cal. App. 3d 401, 183 Cal. Rptr. 898 (1982).

V.

THE TENSION IN ACTION: SANTA BARBARA COUNTY
AND THE OIL INDUSTRY

Among the examples of this tension between the two statutes, possibly the most recent, complex and controversial one is the effort of the oil industry to obtain necessary permits for the onshore facilities needed for offshore oil production operations in the Santa Barbara Channel. After a calamitous oil spill in the Santa Barbara Channel in 1969, Santa Barbara County adopted a philosophy strongly opposing oil development in its neighborhood. For a decade after the spill, Exxon battled the County for permits for its facilities for the enormous Santa Ynez Unit in federal waters off the coast of Santa Barbara County. More recently, however, the U.S. Department of the Interior has sold promising oil and gas leases in the Santa Barbara Channel, and the County is faced with what it sees as the ominous and immediate prospect of half a million barrels of oil per day, to say nothing of the natural gas, moving through onshore facilities near the coastline.⁴⁷

Santa Barbara County, located approximately 100 miles north of Los Angeles, considers its coastline and mountainous interior to be among the nation's most sensitive environments as well as a prime tourist area. Because of limited water availability, the County has successfully fought off urbanization and protected the "smallness" of the community with such rules as the no-new-water-meter rule.⁴⁸

The applications for oil and gas facility permits on land in the County owned already by the respective oil companies have been met with strong county and state Coastal Commission policies and bias against proliferation of oil and gas facilities in the coastal zone, abhorrence of tankers versus pipelines for oil transportation, and protection of air quality.⁴⁹ The fact that the vast oil and gas reserves lie just off the coast of California, in federal waters, locks

47. See R.E. KALLMAN & E.D. WHEELER, *COASTAL CRUDE: IN A SEA OF CONFLICT* (1984). Also, numerous articles have appeared on a regular basis over the last two years in the Santa Barbara News Press on the oil industry.

48. See Santa Barbara County Land Use Element, Circulation Element and Environmental Resource Element, South Coast Policy; Santa Barbara County Coastal Plan, Development Policy 2-2.

On the issue of limited utilities as a means of growth control, see Delogu, *supra* note 16, at 54, and authorities cited therein.

49. See, e.g., Santa Barbara County Board of Supervisors Resolution 84-284 (1984); Santa Barbara County Coastal Plan, Santa Barbara County Coastal Zoning Ordinance §§ 35-154, 156; *Exxon v. Fischer*, No. C-83-3911-SC (N.D. Cal. 1984).

the County and the oil industry in a confrontation governed legally by the tension between CEQA and the PSA.

The Exxon project has been the most visible among all those proposed,⁵⁰ and therefore is an interesting and useful case study. There are two chapters in the Exxon case. For purposes of this analysis, only the second is relevant.⁵¹

After Hondo field production was begun successfully, Exxon began to plan the development of the rest of the Santa Ynez Unit. Exxon was still seeking permits to build onshore facilities including a marine terminal to transport its crude oil to Texas. The project required a multitude of permits, federal, state and local. Exxon, therefore, encouraged the maximum amount of cooperation among the agencies which formed a joint review panel to guide the environmental review process into a single document.⁵²

50. There are several reasons for this. Exxon's Santa Ynez Unit project has been before the decision-makers of California since the early 1970's, whereas the other big oil projects are relative newcomers. Second, Exxon and the County historically have held opposite views on the means of transporting oil—Exxon desiring to carry its oil to Texas markets by tanker; the County desiring Exxon to move its oil out of the County by pipeline, regardless of destination, because of air quality and oil spill concerns.

51. The first half of Exxon's problems in California can be recounted briefly: Exxon applied to Santa Barbara County for the permits necessary to build an onshore oil plant, gas plant and marine tanker terminal to serve the oil and gas production from the Hondo field in the Santa Ynez Unit. After numerous problems with the County and the California Coastal Commission, Exxon received a permit with many conditions which were unacceptable to the company, mainly a condition requiring the terminal to be shut down in five years, at which time Exxon would have had to use a pipeline to transport its oil. Since (a) there was no available pipeline and (b) five years was insufficient time for Exxon to recover its marine terminal investment, the company declined the permit and used instead a converted tanker moored in federal waters as an offshore oil treating facility and marine terminal. This is called the OS&T, which Exxon finally placed in operation in 1981 after several years of litigation by Exxon's opponents over the environmental risks of the OS&T. (The natural gas, which must be processed onshore, was reinjected until this year when Pacific Offshore Pipeline Company commenced operation of a new gas treating plant in Santa Barbara County on Exxon's land.)

In the 1970's the Exxon Hondo story had wide publicity in the Santa Barbara area. See, e.g., A HISTORY OF ENVIRONMENTAL REVIEW IN SANTA BARBARA COUNTY, CALIFORNIA (G.R. Graves & S.L. Simon eds., Public Historical Studies, University of California, Santa Barbara, Public History Monograph No. 4, 1980). For a more recent account, see R.E. KALLMAN & E.D. WHEELER, *supra* note 47.

52. One critical ingredient which was not allowed in the Exxon permit process was the use of the applicant as a resource. By keeping the applicant at a distance from the preparation of the EIR, the agency can assure maximum control but can also risk error, delay and hostility. See *Foundation for San Francisco's Architectural Heritage v. San Francisco*, 106 Cal. App. 3d 893, 165 Cal. Rptr. 401 (1980) where the court refused to find an EIR flawed and CEQA undermined because of the direct involvement of the developer in the preparation of the EIR. See also *Sierra Club v. Lynn*, 502 F.2d 43 (5th Cir. 1974), wherein the court ruled that the direct involvement of the developer in preparation of the environmental document violated no law. The court, in fact, observed the

CEQA and NEPA allow this cooperation, which takes the form of a joint EIS/R.⁵³ Santa Barbara County served as lead agency, under CEQA and the PSA. Exxon filed its application with the County for the necessary permits in November, 1982. Immediately thereafter, the County, which had no published completeness criteria, but which had formed an energy division of its planning department to handle oil projects, submitted to Exxon a list of 222 questions to answer before the project could be deemed complete. Exxon answered those in the ensuing months, while the County posed additional clarifying questions. Finally, Exxon's application was deemed complete on April 11, 1983, and the one-year PSA and CEQA clocks began ticking.

The first draft EIS/R was released for public review in November, 1983, and was attacked immediately by the public as grossly inadequate.⁵⁴ Exxon contested the accuracy of much of the document, and a second draft was commissioned. When it was released on April 20, 1984, again there was much public controversy, and the County staff determined that the document had to be recirculated to the public. The recirculation and time necessary for public hearings and decision-making added to the time already elapsed and exceeded the PSA deadline of April 11, 1984.

Thus, Exxon was faced with the core dilemma: If no time extension was granted to remedy the many problems with the EIS/R and accommodate statutory procedure, the permit application would be denied. On the other hand, if it granted the County more time for additional environmental work, the project would be delayed. The time extension was granted. The second draft required a second time extension for public hearings and for the final version to be prepared. At the permit hearings in August, 1984, Exxon was repeatedly asked to grant the County more time to consider further alternatives to the project. The Company, thoroughly frustrated by the seemingly endless system of delays rewarding inadequacies in the environmental process, refused to grant more time. The County therefore denied Exxon's permit for the essential marine terminal on August 14, 1984, citing CEQA as its basis for requiring still more environmental information.⁵⁵

necessity of a close working relationship between the agency and the applicant. *Id.* at 59.

53. See CAL. PUB. RES. CODE §§ 21083.5-21094 and 40 C.F.R. §§ 1501.6, 1506.2 (1984).

54. See Santa Barbara County Board of Supervisors hearing Dec. 5, 1983. The first draft EIS/R included 11 volumes, totaling 2472 pages.

55. As of this writing, litigation between Exxon and the California Coastal Commis-

One of the significant factors contributing to the problems in the Exxon project, and to others, is the overlapping jurisdictions of numerous agencies regulating the proposed activity. Neither CEQA or the PSA gives full consideration of this situation. Only the U.S. Constitution is available to resolve control disputes.

A single large project can easily cross jurisdictional barriers thereby involving federal and state agencies in one or more states, all of which have authority over the project.⁵⁶ Within the state of California, CEQA expects one agency to be the lead agency. Where a federal agency, however, is involved, there is no declaration by Congress that the federal agency should be the lead agency.

VI.

CONCLUSION

The unfortunate conclusion that can be drawn from the problems posed by the PSA and CEQA, especially in light of few recent case histories, is that the PSA is of limited value in any effort to curtail the use of CEQA to delay indefinitely the approval of a project where no growth is a public goal. That a balance against the procedural abuses of CEQA is necessary is obvious, as is the fact that none exists unless and until a court or legislature penalizes government agencies for such abuses.

An applicant needs a permit rather than the satisfaction of a litigation victory. In *Kollsman*, the applicant has been waiting seven years with no return on his investment. Exxon had to wait from 1968 when it purchased the Santa Ynez Unit leases to 1981 to produce a single barrel of oil.

This conclusion scarcely coincides with the intent of the California Legislature to impose a practical balance on the investigation of environmental consequences of land development. What, then, is the remedy? The California courts have expanded the force of CEQA to the point that it is a sacred cow, and a tool chest for those who oppose any project. The PSA and CEQA should be revised to provide that in no event should an application be denied on the

sion on similar issues is under way, as is an appeal of the Coastal Commission's denial of a consistency concurrence under the Coastal Zone Management Act. 16 U.S.C. §§ 1451-1464 (1985).

The applicant pays dearly for the continuing CEQA process. The price of an oil project EIR alone in Santa Barbara County currently averages \$2.5 million.

56. In the case of offshore oil projects, the outer continental shelf (OCS) beyond the three-mile limit is subject to federal regulation only, whereas those portions of such a project within the three-mile limit are in the jurisdiction of the coastal state, its subdivisions and its agencies. See *California v. Kleppe*, 604 F.2d 1187 (9th Cir. 1979).

grounds that information available during the early phases of the CEQA process was not investigated by the agency or its contractor.

One year should be enough time for an environmental impact report to be prepared. This is particularly true in California because the PSA allows an agency ample opportunity to gather information from the applicant in the process of deeming the application complete. Because time is of great value to developers, some statutory respect must be given to the one-year mandate of the PSA.

Alternatively, the California courts should adopt the position of the Washington Supreme Court in *Norco*,⁵⁷ strictly enforcing statutory time limits for permit decisions. Other jurisdictions facing similar problems should act with equal conviction in granting or rejecting permits within strictly enforced time constraints in order to put an end to the otherwise limitless abuse of the environmental review process where no-growth is the actual goal.

57. 97 Wash. 2d 680, 649 P.2d 106 (1982).