



9-1-1975

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Recommended Citation

Sheldon Chernove, *California Environmental Quality Act and Eminent Domain: Failure to Comply with CEQA as a Defense to Condemnation*, 8 Loy. L.A. L. Rev. 734 (1975).

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CALIFORNIA ENVIRONMENTAL QUALITY ACT AND EMINENT DOMAIN: FAILURE TO COMPLY WITH CEQA AS A DEFENSE TO CONDEMNATION

[Their] ideology gave primacy to the denatured and dehumanized environment in which the new technological complex could flourish without being limited by any human interests and values other than those of technology itself. All too soon a large portion of the human race would virtually forget that there had ever existed any other kind of environment, or any other alternative mode of life.¹

I. INTRODUCTION

In response to the rapidly increasing degradation of the environment by a continually expanding technology, Congress in 1970 enacted the National Environmental Policy Act (NEPA).² Shortly thereafter, the California Legislature followed with the enactment of the California Environmental Quality Act (CEQA).³ The policies behind both NEPA and CEQA are similar in that they seek to provide every person with a habitable and comfortable environment in which to live and with opportunities to participate in the decision-making processes of the agencies responsible for preserving environmental integrity.⁴ These

1. L. MUMFORD, *THE MYTH OF THE MACHINE: THE PENTAGON OF POWER* 24 (1970).

2. 42 U.S.C. §§ 4321-47 (1970).

3. CAL. PUB. RES. CODE ANN. §§ 21000-174 (West Supp. 1975).

4. NEPA embodies Congressional recognition of man's continuous encroachment upon his environment. The Act emphasizes that urbanization, industrial growth and resource exploitation must be overseen by state and federal governments in order to maintain conditions in which man and nature can coexist. Section 4331 states that, in order to improve and coordinate federal plans, programs, and resources to that end, it is the responsibility of the federal government to use all practicable means to:

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

42 U.S.C. § 4331(b) (1970).

policies are implemented through affirmative action provisions⁵ requiring the disclosure of all potential environmental impacts resulting from a particular project.⁶

NEPA and CEQA apply to all governmental projects and to all private projects subject either to governmental approval or substantial government involvement and which may have a significant effect on the environment.⁷ The scope of these acts is such that governmental projects which require the acquisition of private property through eminent domain proceedings may also be subject to their disclosure re-

5. The affirmative action requirements of NEPA are found in 42 U.S.C. § 4332 (1970). Therein all agencies of the federal government are required to utilize a systematic approach which will insure an integrated use of natural and social sciences in the planning and design stages of projects which might have an impact on man's environment.

6. Federal agencies are required to

include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(C) (1970). The basis of these reports must include discussion and comment by all appropriate local, state, and federal agencies. In addition, alternatives to the proposed action must be considered, 42 U.S.C. § 4332(D) (1970).

In California, environmental impact reports are provided for by CEQA:

All state agencies, boards, and commissions shall prepare, or cause to be prepared by contract, and certify the completion of an environmental impact report on any project they propose to carry out or approve which may have a significant effect on the environment. Such a report shall include a detailed statement setting forth the following:

- (a) The environmental impact of the proposed action.
- (b) Any adverse environmental effects which cannot be avoided if the proposal is implemented.
- (c) Mitigation measures proposed to minimize the impact including, but not limited to, measures to reduce wasteful, inefficient, and unnecessary consumption of energy.
- (d) Alternatives to the proposed action.
- (e) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity.
- (f) Any irreversible environmental changes which would be involved in the proposed action should it be implemented.
- (g) The growth-inducing impact of the proposed action.

CAL. PUB. RES. CODE ANN. § 21100 (West Supp. 1975).

7. CEQA by its very terms is made applicable to all projects that governmental branches will carry out or approve. CAL. PUB. RES. CODE ANN. § 21100 (West Supp. 1975); see notes 15-16 *infra*. Thus the limits of private actions that are within the act are susceptible of delineation. NEPA, on the other hand, is applicable only to major federal actions and hence presents interpretive difficulties in determining the private projects, or for that matter all non-federal programs, to which its provisions apply. See note 6 *supra*.

quirements.⁸ Consequently, there may be considerable interaction between the eminent domain laws and the disclosure requirements of the environmental acts.⁹ Because NEPA and CEQA fail to recognize this interaction,¹⁰ considerable time, effort, and expense is often expended in eminent domain proceedings only to discover that a proposed project cannot be carried out as planned.¹¹ The major reason for this is that the condemnor has failed to comply with the disclosure requirements of NEPA or CEQA. In order to minimize the time and expense involved in eminent domain proceedings, the determination of a project's environmental impact should be made a condition precedent to the institution of such proceedings.¹² Furthermore, failure to comply with the disclosure requirements should be recognized as an affirmative defense in eminent domain proceedings.¹³

II. STATUTORY REQUIREMENTS OF CEQA

It is the declared policy of the California Legislature to protect the environment from any adverse impact from development.¹⁴ In an attempt to accomplish this goal, the legislature requires that each project¹⁵ initiated by a state or local agency, or a project initiated from

8. See note 7 *supra*; notes 38-48 *infra* and accompanying text.

9. See notes 73-93 *infra* and accompanying text.

10. See notes 74-75 *infra* and accompanying text.

11. See text accompanying notes 81-86 *infra*.

12. See text accompanying notes 94-100 *infra*.

13. See text accompanying notes 101-111 *infra*.

14. CAL. PUB. RES. CODE ANN. §§ 21000-01 (West Supp. 1975) contain declarations of policy and intent similar to those found in 42 U.S.C. §§ 4321, 4331 (1970). In sum, California's policy is to develop and maintain a healthful and high quality environment within the limitations of the presently existing environment. Each citizen has the responsibility to contribute to preservation and enhancement of the environment. In turn the government is required to regulate its management of natural resources and to control development in order to prevent environmental damage. In furtherance of this objective, governmental agencies are required to develop environmental protection procedures.

15. (a) Project means the whole of an action, resulting in physical impact on the environment, directly or ultimately, that is any of the following:

(1) Any activity directly undertaken by any public agency including but not limited to public works construction and related activities, clearing or grading of land, improvements to existing public structures, enactment and amendment of zoning ordinances, and the adoption of local General Plans or elements thereof pursuant to Government Code Sections 65100-65700.

(2) An activity undertaken by a person which is supported in whole or in part through public agency contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies.

(3) An activity involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.

(b) Project does not include:

(1) Anything specifically exempted by state law.

(2) Proposals for legislation to be enacted by the state legislature.

the private sector which requires state or local agency approval,¹⁶ be analyzed and evaluated in terms of its potential environmental impact.¹⁷ The appropriate public agency (lead agency)¹⁸ must conduct an initial study to determine whether or not the project may have a significant effect on the environment.¹⁹ Where the government plans to carry out the program, the agency must prepare the necessary documents through its own efforts.²⁰ With regard to a nongovernmental project, the lead agency may require the private person to submit a statement of data and information which will enable the agency to make its determination.²¹ If the agency finds, based on the data statement and its own independent investigation, that no significant im-

(3) Continuing administrative or maintenance activities, such as purchases for supplies, personnel-related actions, emergency repairs to public service facilities, general policy and procedure making (except as they are applied to specific instances covered above), feasibility or planning studies.

(4) The submittal of proposals to a vote of the people of the State or of a particular community.

(c) The term "project" refers to the underlying activity and not to the governmental approval process.

14 CAL. ADM. CODE § 15037. See CAL. PUB. RES. CODE ANN. § 21065 (West Supp. 1975) for a general definition of project. See also *County of Inyo v. Yorty*, 32 Cal. App. 3d 795, 803-08, 108 Cal. Rptr. 377, 383-86 (1973).

16. 14 CAL. ADM. CODE § 15061(a)-(b). State or local agency approval is required in those situations where permits for a building, a zoning variance, or a conditional use are required by local building codes or zoning ordinances prior to the commencement of a project. See, e.g., *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972) (involving approval of a conditional use permit). See notes 41-47 *infra* and accompanying text. Another example is the requirement of obtaining a certificate of convenience and necessity before approval from the Public Utilities Commission can be sought. 71 Op. and Orders of P.U.C. 150 (Dec. No. 77031) (1970). Since most, if not all, private projects require some form of government permit or approval, the reach of CEQA is not limited only to public projects.

17. CAL. PUB. RES. CODE ANN. § 21100 (West Supp. 1975) (see note 6 *supra* for pertinent text); see *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247, 263, 502 P.2d 1049, 1059, 104 Cal. Rptr. 761, 771 (1972); 14 CAL. ADM. CODE §§ 15011, 15061, 15141-43.

18. In an attempt to provide an unbiased and neutral review of the environmental impact of a proposed project, the California Legislature provided for "lead agency" review and investigation. The lead agency is "the public agency which has the principal responsibility for preparing environmental documents and for carrying out or approving a project which may have a significant effect on the environment." 14 CAL. ADM. CODE § 15030. See 14 CAL. ADM. CODE §§ 15064-66 for other applications of the lead agency principle.

19. *Id.* § 15080. It should be noted that § 15080 provides that certain projects need not comply with the initial study requirement if it is part of a class of projects that qualifies for a "categorical exemption." For a list of the categorical exemptions see *id.* §§ 15100-116. The criteria for determining whether or not a project will have a significant effect are set forth at *id.* §§ 15081-82.

20. *Id.* § 15061(a).

21. *Id.* §§ 15061(b), 15080.

impact on the environment will result from the project, it will issue a negative declaration.²² This declaration signifies that any impact the project may have on the environment is considered to be negligible and that the project may proceed as planned.²³ In the event that the agency finds that a significant impact on the environment will result from the project, the agency is required to prepare an Environmental Impact Report (EIR).²⁴

In those cases where an EIR is necessary, the lead agency may require the private person to submit additional data and information which will aid in the preparation of the final EIR.²⁵ After the requisite information has been gathered, the agency is required to consider all

22. *Id.* § 15033.

23. (a) A Negative Declaration shall be prepared for a project which could potentially have a significant effect on the environment, but which the lead agency finds on the basis of an Initial Study will not have a significant effect on the environment.

(b) A Negative Declaration must include a brief description of the project as proposed, a finding that the project will not have a significant effect on the environment, a brief statement of reasons to support the findings, and a statement indicating who prepared the initial study and where a copy of it may be obtained. . . .

(d) After making a decision to carry out or approve the project, the lead agency shall file a Notice of Determination with a copy of the Negative Declaration attached. The Notice of Determination shall include the decision of the agency to approve or disapprove the project, the determination of the agency whether the project will have a significant effect on the environment, and a statement that no EIR has been prepared pursuant to the provisions of CEQA.

Id. § 15083.

24. *Id.* § 15084 (1973); see note 92 *infra* for definition of EIR.

25. The preparation of an EIR requires adherence to the following:

(a) If the project is to be carried out by a nongovernmental person, the lead agency may require such person to submit data and information necessary to enable the lead agency to prepare the EIR. This information may be transmitted in the form of a draft EIR. The draft EIR which is sent out for public review must reflect the independent judgment of the lead agency. . . .

(b) The content of an EIR is described in Article 9 of these Guidelines. . . . Before completing a draft EIR . . . the lead agency should consult directly with any person or organization it believes will be concerned with the environmental effects of the project. . . . After completing a draft EIR, the lead agency must consult with, and obtain the comments of, any public agency which has jurisdiction by law with respect to the project and may consult with any person who has special expertise with respect to any environmental impact involved. Opportunity for comments from the general public should be provided.

(d) The lead agency shall evaluate comments received from persons who reviewed the draft EIR.

(e) The lead agency shall prepare a final EIR. . . .

(f) The final EIR shall be presented to the decision-making body of the lead agency. . . .

(g) After making a decision on the project, the lead agency shall file a notice of action taken on the project. This notice shall be referred to as a Notice of Determination. Such notice shall include (1) the decision of the agency to approve or disapprove the project, (2) the determination of the agency whether the project will or will not have significant effect on the environment, and (3) a statement that an EIR has been prepared pursuant to the provisions of CEQA.

14 CAL. ADM. CODE § 15085.

phases of the project before making a final decision.²⁶ In so doing, the agency must evaluate the direct and indirect impacts of the project on the environment on both a short-term and long-term basis.²⁷ Alternatives to the project or its location which could attain the basic objectives of the project must be investigated.²⁸ Where changes in design²⁹ or mitigation measures³⁰ can eliminate or reduce to an "insignificant level"³¹ the adverse impact of a project, these alternatives must be seriously considered irrespective of the fact that they may substantially impede the attainment of the project objectives or result in increased cost.³² Moreover, the specific alternative of "no project" must always be evaluated.³³

In view of this last requirement, it is evident that plans should not be finalized until the environmental impact of the project has been determined.³⁴ If the agency does not issue a negative declaration or if it cannot find acceptable overriding considerations, the proponent of the project will have no alternative but to relocate the project to an acceptable location or abandon the project in its entirety.³⁵

Although the procedural requirements of CEQA are clearly set forth, the Act is silent with respect to such important questions as its scope of applicability and the time for compliance with its requirements. Federal decisions interpreting NEPA may be useful in resolving these questions. The California courts have recognized that CEQA is similar in structure and purpose to NEPA. The similarities are so pronounced that California decisions have uniformly declared

26. *Id.* § 15143.

27. *Id.* § 15143(a).

28. *Id.* § 15143(d).

29. *Id.* § 15143(b).

30. *Id.* § 15143(c).

31. The term insignificant level is one of those legal gems which defies precise definition. However, it appears that when a court reviews the sufficiency of an EIR, the test to be applied measures whether there has been an adequate balancing of environmental costs against societal benefits. Thus, where the benefits outweigh the costs it can be said that the impact upon the environment reaches only an insignificant level. *See Environmental Defense Fund, Inc. v. Froehke*, 473 F.2d 346, 353 (8th Cir. 1972).

32. 14 CAL. ADM. CODE § 15143(d).

33. *Id.*

34. In *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972), the court found that an "impact report must be specially prepared in written form before the governmental entity makes its decision." *Id.* at 263 n.8, 502 P.2d at 1059 n.8, 104 Cal. Rptr. at 771 n.8.

35. *See Note, The Least Adverse Alternative Approach to Substantive Review Under NEPA*, 88 HARV. L. REV. 735, 748-49 (1975) (evaluation of corresponding NEPA section reaches same conclusion).

that judicial interpretation and construction of NEPA will be strongly persuasive in interpreting CEQA.³⁶

An analysis of CEQA and the decisional law generated by the Act's vagaries with respect to the time for compliance and the breadth of the Act's reach should provide a basis for ascertaining whether or not and how the environmental laws relate to the eminent domain laws.

A. Scope of CEQA

In analyzing the scope of CEQA, it is necessary to determine the meaning of "project" as defined by the Act. CEQA guidelines³⁷ published by the California Secretary of Resources indicate that a project is "the whole of an action, resulting in physical impact on the environment"³⁸ The guidelines further provide that "[w]hen a public agency plans to carry out or approve a project which may have a significant effect on the environment, the lead agency shall prepare environmental documents"³⁹ These requirements are also applicable to private projects for which public agency approval is necessary.⁴⁰

In defining a project as "the whole of an action," a question arises as to whether or not land acquisition falls within this definition.⁴¹ This question was considered in *Friends of Mammoth v. Board of Supervisors*.⁴² In this case of first impression,⁴³ the court extensively ana-

36. This policy was clearly enunciated in *Environmental Defense Fund, Inc. v. Coast-side County Water Dist.*, 27 Cal. App. 3d 695, 104 Cal. Rptr. 197 (1972), wherein the court said:

Lastly, we have the help of several decisions . . . by federal courts in construing the National Environmental Policy Act. (83 Stat. 852, 42 U.S.C. 4331 et seq.) The federal act became law on January 1, 1970, just a bit short of a year before that of California. The two statutes are so parallel in content and so nearly identical in words that judicial interpretation of the federal law is strongly persuasive in our deciding the meaning of our state statute.

Id. at 701, 104 Cal. Rptr. at 200; see *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247, 260, 502 P.2d 1049, 1057, 104 Cal. Rptr. 761, 769 (1972); *City of Orange v. Valenti*, 37 Cal. App. 3d 240, 246, 112 Cal. Rptr. 379, 384 (1974).

37. 14 CAL. ADM. CODE § 15000 et seq. The guidelines are promulgated pursuant to CAL. PUB. RES. CODE ANN. § 21083 (West Supp. 1975).

38. 14 CAL. ADM. CODE § 15037(a) (emphasis added).

39. *Id.* § 15061(a).

40. *Id.* For example, when a utility company desires to construct power lines, it must acquire the Public Utilities Commission certification for such construction. See 71 Op. & Orders of P.U.C. 150 (Dec. No. 77031) (1970).

41. If the answer to this question is yes, it will not matter whether the acquisition through condemnation is by a public agency or a private entity. Both must comply with the requirements of CEQA. See notes 99-105 *infra* and accompanying text.

42. 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972).

43. Procedurally, the case reached the supreme court on appeal from a denial of a

lyzed the legislative intent underlying CEQA,⁴⁴ and devoted considerable discussion to the scope and parameters of the Act itself.⁴⁵ In so doing, the court stated that CEQA regulates "construction, *acquisition*, or other development"⁴⁶ of a project, thereby placing acquisition of property within the scope of CEQA.⁴⁷

B. Time for Compliance

Projects begin to be "carried out" long before they reach either the construction or acquisition stage. Environmental planning may thus begin at the same time project planning and development are being undertaken. Since acquisition of land represents a strong commitment, and perhaps an irrevocable one, the dictates of CEQA seem to rationally lead to the conclusion that environmental analysis of the location is essential before irrevocable commitments or expenditures in respect to land acquisition are made.⁴⁸

However, while the scope of applicability of CEQA has now been defined, neither NEPA nor CEQA specifies when environmental impact studies must commence.⁴⁹ Those courts which have considered the

writ of administrative mandamus. The dispute concerned the propriety of the granting of a conditional use permit by the Mono County Planning Commission. Plaintiffs, members of a class, appealed the issuance of the permit to the Mono County Board of Supervisors. The Board of Supervisors affirmed the issuance of the permit, whereupon plaintiffs sought relief in the court of appeal through a writ of administrative mandamus. *Id.* at 253, 502 P.2d at 1052, 104 Cal. Rptr. at 764. The action of the Planning Commission was once again affirmed. The supreme court granted a hearing to determine the question of whether or not CEQA applies to private activities for which a permit or other entitlement is required. *Id.* at 252-53, 502 P.2d at 1051-52, 104 Cal. Rptr. at 763-64. Although the question was narrowly defined, the opinion is replete with dicta from which has grown the whole of the California environmental law, both procedural (the guidelines) and substantive (decisional law).

44. *Id.* at 256-66, 502 P.2d at 1052-62, 104 Cal. Rptr. at 764-74.

45. *Id.*

46. *Id.* at 257, 502 P.2d at 1055, 104 Cal. Rptr. at 767 (emphasis added). The court stated in full:

The Legislature also evidenced strong concern for the promulgation of standards by which environmental needs could be regularly included in the decision-making process. Because of the regular involvement of public entities in the issuance of permits it would appear that requiring "governmental agencies at all levels to develop standards and procedures necessary to protect environmental quality" *necessarily includes not only situations in which the government itself engages in construction, acquisition or other development, but also those instances in which the state regulates private activity.*

Id. at 257, 502 P.2d at 1055, 104 Cal. Rptr. at 767 (emphasis added and citations omitted).

47. See text accompanying notes 101-05 *infra*.

48. *People v. Bosio*, 47 Cal. App. 3d 375, 121 Cal. Rptr. 495 (1975).

49. A thorough reading of both acts and the guidelines promulgated thereunder reveals nothing more specific than that preparation of these documents must occur at or

question indicate that the environmental impacts of a project should be investigated *during* its decision-making stages.⁵⁰ In *Calvert Cliffs' Coordinating Committee v. AEC*,⁵¹ a decision concerning NEPA, Judge Skelly Wright declared:

Compliance to the "fullest" possible extent would seem to demand that environmental issues be considered at every important stage in the decision making process concerning a particular action—at every stage when an overall balancing of environmental and nonenvironmental factors is appropriate and where alterations might be made in the proposed action to minimize environmental costs.⁵²

The CEQA guidelines are substantially in accord with this reasoning:

An EIR is a useful planning tool to enable environmental constraints and opportunities to be considered *before project plans are finalized*. EIRs should be prepared as early in the planning process as possible to enable environmental considerations to influence project program or design.⁵³

Thus, it would appear that CEQA requires compliance with its provision prior to any final judicial determination of the propriety of any land acquisition.

There is also support for the proposition that these environmental investigations should be completed and a determination of environmental impact be made therefrom before *any* action is taken with respect to the project under consideration. In *Environmental Defense Fund v. Hardin*,⁵⁴ a preliminary injunction was sought to prevent the Secretary of Agriculture from using chemicals in the implementation of a

during the decision-making process or at the earliest possible time practicable. See text accompanying notes 154-56 *infra*.

50. *Calvert Cliffs' Coord. Comm. v. AEC*, 449 F.2d 1109, 1111 (D.C. Cir. 1971); *Bozung v. Local Agency Formation Comm'n*, 13 Cal. 3d 263, 529 P.2d 1017, 118 Cal. Rptr. 249 (1975). Recognizing the gap in the environmental laws with respect to the proper time for compliance with the environmental study requirements of the acts, public agencies have attempted to provide guidelines. In a report sponsored by the Energy Policy Staff of the Office of Science and Technology, it was recommended that utilities resolve all environmental questions early in the planning process. Further, the resolution of such questions should be made an integral part of utility planning, and studies should be conducted well in advance of any attempt to carry out the proposed project. ENERGY POLICY STAFF, OFFICE OF SCIENCE AND TECHNOLOGY, ELECTRIC POWER AND THE ENVIRONMENT vii, viii (1970).

51. 449 F.2d 1109 (D.C. Cir. 1971).

52. *Id.* at 1118; *accord*, *Morningside-Lenox Park Ass'n v. Volpe*, 334 F. Supp. 132, 144 (N.D. Ga. 1971); *Nolop v. Volpe*, 333 F. Supp. 1364, 1368 (S.D.S.D. 1971). See generally *Cohen v. Price Comm'n*, 337 F. Supp. 1236, 1241 (S.D.N.Y. 1972) (*dictum*).

53. 14 CAL. ADM. CODE § 15013 (*emphasis added*).

54. 325 F. Supp. 1401 (D.D.C. 1971).

fire ant control program.⁵⁵ In finding that this program could significantly affect the quality of human environment, the court stated:

[NEPA] requires an agency to undertake research *during the planning of its programs* that is adequate to expose their potential environmental impact and to disclose the results of this research to other interested agencies.⁵⁶

III. THE INTERACTION OF CEQA AND THE EMINENT DOMAIN LAWS

Condemnation of private property for a public use is effectuated in California through eminent domain proceedings.⁵⁷ Since CEQA applies to all development projects which may have a significant effect on the environment unless expressly exempted from the provisions of the Act,⁵⁸ projects which require condemnation of private property for public use may be subject to the provisions of CEQA.⁵⁹

California law requires that any public, quasi public, or private entity or person⁶⁰ seeking to condemn private property for a public use⁶¹ must plead in the complaint through which the action is instituted that the taking is necessary to a public use.⁶² Necessity is not of constitutional

55. *Id.* at 1402. The chemical, used almost exclusively as a pesticide for the control of fire ants, was found to be directly toxic to shrimp, crabs, and other marine animals. *Id.* at 1405.

56. *Id.* at 1403 (emphasis added).

57. CAL. CIV. CODE § 1001 (West 1970).

58. 14 CAL. ADM. CODE §§ 15100-16.

59. See notes 41-47 *supra* and accompanying text. An exhaustive list of the permitted uses for which land acquisition might be effectuated through the power of eminent domain is found in CAL. CODE CIV. PRO. § 1238 (West 1967).

60. Any person may, without further legislative action, acquire private property for any use specified in Section 1238 of the Code of Civil Procedure either by consent of the owner or by proceedings had under the provisions of Title 7, Part 3 of the Code of Civil Procedure; and any person seeking to acquire property for any of the uses mentioned in such Title is "an agent of the State," or a "person in charge of such use," within the meaning of those terms as used in such Title. . . .

CAL. CIV. CODE § 1001 (West 1970) (footnote omitted). Purely private persons are thus given a limited right to exercise the power of eminent domain. Judicial interpretation has indicated that persons seeking to qualify under this section must have authorization from the state to have charge of the use for which the condemnation is sought. Such an interpretation is a judicial emasculation of the section. See *Yeshiva Torah Emeth Academy v. Univ. of S. Cal.*, 208 Cal. App. 2d 618, 25 Cal. Rptr. 422 (1962); *People v. Oken*, 159 Cal. App. 2d 456, 324 P.2d 58 (1958). Where this qualification is met, necessity must be pleaded and proved. *Linggi v. Garovotti*, 45 Cal. 2d 20, 286 P.2d 15 (1955).

61. Eminent domain is the right of the people or Government to take private property for public use.

CAL. CODE CIV. PRO. § 1237 (West 1967); see CAL. CONST. art. I, § 19.

62. CAL. CODE CIV. PRO. § 1241(2) (West Supp. 1975).

magnitude; it is merely a legislative superimposition upon the exercise of the sovereign right of eminent domain.⁶³

Although a general allegation of necessity is sufficient in a complaint,⁶⁴ a condemnor still must prove by a preponderance of the evidence the necessity of the taking for the proposed use.⁶⁵ The elements making up the proof of necessity are threefold: (1) the public necessity of the proposed use to be made of the property taken; (2) the necessity of the property to be taken for the proposed use; and (3) *that the location of the proposed public project is most compatible with the greatest public good and the least private injury.*⁶⁶

It has long been recognized that the determination of necessity rests with the legislative branch of government or that it may be delegated by that branch to its public officers.⁶⁷ California has accomplished the delegation of the determination of necessity through its enactment of Code of Civil Procedure section 1241.⁶⁸ Therein is given to certain governmental entities the power to determine, by resolution or ordinance, that the taking is necessary for the use sought to be conducted on the property taken.⁶⁹ It is further provided by section 1241 that in the case of certain enumerated entities,⁷⁰ their resolution or ordinance will be conclusive evidence of the necessity of the proposed project,

63. *See id.*

64. *Linggi v. Garovotti*, 45 Cal. 2d 20, 27, 286 P.2d 15, 19 (1955) (holding that allegations in a complaint by a private person that the exercise of eminent domain was necessary to abate a nuisance was sufficient to state a cause of action).

65. *Id.* A somewhat lesser standard of proof is envisioned for public or quasi-public entities than for persons or entities utilizing the provisions of CAL. CIV. CODE § 1001 (West 1970). *See, e.g., Slemmons v. Southern Cal. Edison Co.*, 252 Cal. App. 2d 1022, 1027, 60 Cal. Rptr. 785, 788 (1967) (there must be a prima facie showing the necessity of the taking and the burden of such a showing is upon the plaintiff). *See also*, CAL. CODE CIV. PRO. § 1241(2) (West Supp. 1975).

66. CAL. CODE CIV. PRO. § 1241(2) (West Supp. 1975) (emphasis added).

67. The Supreme Court in *Rindge Co. v. County of Los Angeles*, 262 U.S. 700 (1923), stated:

The necessity for appropriating private property for public use is not a judicial question. This power resides in the legislature, and may either be exercised by the legislature or delegated by it to public officers. . . . "That the necessity and expediency of taking property for public use is a legislative and not a judicial question is not open to discussion. . . ."

Id. at 709, quoting *Joslin Mfg. Co. v. Providence*, 262 U.S. 668, 678 (1923); *see People v. Chevalier*, 52 Cal. 2d 299, 307, 340 P.2d 598, 601 (1959) (declaring that even in the case of fraud or abuse of discretion the necessity issue could not become justiciable). *See generally* McIntire, "Necessity" In Condemnation Cases—Who Speaks for the People?, 22 HASTINGS L.J. 561 (1971); Comment, *The Justiciability of Necessity in California Eminent Domain Proceedings*, 5 U.C. DAVIS L. REV. 330 (1972).

68. CAL. CODE CIV. PRO. § 1241 (West Supp. 1975).

69. *Id.*

70. *Id.* § 1241(1).

the property sought to be taken, and the compatibility of the project with the greatest public good and least private injury.⁷¹ In instances where the application of the conclusive evidence rule is appropriate, the issue of necessity becomes nonjusticiable.⁷²

A. Lead Agency Approval of Location as an Element of Proof of Necessity in Eminent Domain Proceedings

Compliance with CEQA appears to be directly related to the proof of necessity in eminent domain proceedings. Until the agency has passed upon the propriety of the proposed location, a condemnor cannot prove that his project is planned and located in a manner most compatible with the greatest public good and least private injury.⁷³

The interaction of the environmental requirements of CEQA and proof of necessity in eminent domain proceedings has created an anomalous situation. There is no provision in CEQA requiring a determination of environmental impact prior to a final judgment in eminent domain proceedings.⁷⁴ Conversely, there is no provision in the eminent domain laws which requires that a determination of environmental impact be conducted and concluded prior to final judgment.⁷⁵ Thus, a court in determining necessity may conclude that a project's location is compatible with the greatest public good and least private injury, while a lead agency may decide the location is environmentally detrimental. Although the court's analysis of location is predicated on different considerations from that of the lead agency, the decision of one inhibits the efficiency of the other in implementing a public project.

Several problems may arise where the superior court in a condemnation proceeding resolves the issue of necessity and the location element inherent therein⁷⁶ prior to an agency's determination⁷⁷ of environmental

71. *Id.*

72. See note 67 *supra*. Although throughout the balance of the article compliance with CEQA will be discussed as a precondition to condemnation, it should be apparent that this precondition can be broken down into two subconsiderations. Where the condemnor is without the benefit of the conclusive evidence doctrine, compliance with CEQA must be considered as an affirmative defense raised in the answer in connection with the necessity defense. Where the conclusive evidence doctrine applies thus making the necessity issue nonjusticiable, compliance with CEQA must be viewed as a condition precedent to condemnation apart from the necessity considerations.

73. CAL. CODE CIV. PRO. § 1241(2) (West Supp. 1975).

74. See CAL. PUB. RES. CODE ANN. §§ 21000 *et seq.* (West Supp. 1975).

75. See CAL. CODE CIV. PRO. §§ 1237-67 (West Supp. 1975).

76. See *id.* § 1241.

77. See text accompanying notes 25-35 *supra*.

impact. Where the court permits acquisition to begin prior to this determination, the lead agency is placed in an untenable position. The condemnor will have acquired property for the construction of a public project at a substantial cost. If the agency now determines that adverse environmental effects will result from the planned construction, the condemnor may be forced to abandon the project at a substantial cost.⁷⁸ In order to avoid this situation, an agency might summarily ratify the project irrespective of adverse environmental effects.⁷⁹

Where the agency does not choose to ignore the adverse environmental effects, it may order the relocation or abandonment of the project.⁸⁰ The superior court⁸¹ will have determined as a prerequisite to the acquisition of the property that the project is planned and located for the greatest public good and the least private harm.⁸² The agency's subsequent determination will indicate that the project is not planned or located for this purpose.⁸³ In so doing, the administrative agency will have reversed the result reached in the superior court.⁸⁴ The re-

78. See text accompanying notes 83-90 *infra*.

79. See 14 CAL. ADM. CODE § 15012 which provides in part that:

While CEQA requires that major consideration be given to preventing environmental damage, it is recognized that public agencies have obligations to balance other public objectives, including economic and social factors in determining whether and how a project should be approved.

80. The EIR is required to:

[d]escribe any known alternatives to the project or to the location of the project, which could feasibly attain the basic objectives of the project, and why they were rejected in favor of the ultimate choice. The specific alternative of "no project" must also always be evaluated, along with the impact. Attention should be paid to alternatives capable of substantially reducing or eliminating any environmentally adverse impacts, even if these alternatives substantially impede the attainment of the project objectives, and are most costly.

Id. § 15143(d).

81. The superior court has fundamental jurisdiction of eminent domain proceedings. CAL. CODE CIV. PRO. § 1243 (West 1972).

82. See CAL. CODE CIV. PRO. § 1241(2) (West Supp. 1975); notes 57-66 *supra* and accompanying text.

83. See note 14 *supra* and accompanying text.

84. Remedies may be available to the property owner in this situation. See Sterling, *Return Right for Former Owners of Land Taken By Eminent Domain*, 4 PAC. L.J. 65 (1973) (discussing in great detail the problem of returning previously condemned land when a determination has been made that the public use sought to be conducted thereon cannot be carried out. *Id.* at 75-116). In *Seadale Indus., Inc. v. Florida Power & Light Co.*, 245 So. 2d 209 (Fla. 1971), a condemnor was allowed to acquire a strip of land prior to obtaining the necessary environmental approval. The Florida Supreme Court held that if the condemning agency could reasonably demonstrate that the requirements of the independent environmental agencies could be met and no irreparable damage would result to the environment from allowing acquisition, condemnees would not be permitted to attack the condemnation on the grounds of lack of compliance. *Id.* at 215. In a concurring opinion, it was suggested that the condemnor should be permitted to acquire a defeasible fee which would revert in the condemnee in the event the con-

sult is that a condemnor may be successful in an eminent domain proceeding only to find that his proposed project cannot be carried out because it has a substantial adverse impact on the environment.⁸⁵

In order to avoid this conflict, a condemnor subject to the disclosure requirements of CEQA should refrain from instituting condemnation proceedings until a negative declaration⁸⁶ or a final determination of environmental impact has been issued.⁸⁷ A more complete and rational solution would be to require compliance with CEQA as a precondition to the institution of eminent domain proceedings—a position which may be supported by a consideration of some of the various aspects of CEQA and the eminent domain laws.⁸⁸

demnor was unable to secure the independent environmental agency's approval. *Id.* at 216 (Ervin, J., concurring). In light of the discussion that follows, these solutions do not seem satisfactory. The law seems clear that a condemnor should be entitled to acquire fee simple title, but only after the proper administrative steps have been taken. See notes 94-100 *infra* and accompanying text.

85. See 14 CAL. ADM. CODE § 15081.

86. Negative declaration means a statement by the lead agency briefly presenting the reasons that the project, although not otherwise exempt, would not have a significant effect on the environment and therefore does not require an EIR.

Id. § 15033.

87. Environmental Impact Report (EIR) means a detailed statement setting forth the environmental effects and considerations pertaining to a project as specified in Section 21100 of the California Environmental Quality Act.

(a) Draft EIR means an EIR containing the information specified in Sections 15141, 15142, and 15143 of these Guidelines.

(b) Final EIR means an EIR containing the information specified in Sections 15141, 15142, 15143, and 15144 of these Guidelines, a section for comments received in the consultation process, and the response of the lead agency to the comments received. The final EIR is discussed in detail in Section 15146.

Id. § 15027.

88. A recent California case, *People v. Bosio*, 47 Cal. App. 3d 375, 121 Cal. Rptr. 495 (1975) refused to consider the question, raised by appellant condemnees, concerning whether or not compliance with CEQA was a condition precedent to continuation of the condemnation action. Compare *Michigan State Highway Comm'n v. Vanderkloot*, 220 N.W.2d 416 (Mich. 1974), where the court found a relationship between Michigan's environmental laws and the statutory requirement of necessity relative to condemnation proceedings. In so doing, the court held that the constitutional provision for the protection of the environment applied to the Highway Condemnation Act. *Id.* at 425. The considerations mandated by the Michigan law parallel the alternative considerations of the California law. See note 14 *supra* and accompanying text. Ultimately it was concluded that the Highway Condemnation Act was not unconstitutional for failure to provide for synchronization with the Michigan constitutional provisions for environmental protection. 220 N.W.2d at 430. In reaching this decision, the court held that, in considering possible locations for highway projects, the Highway Commission *must* consider the environmental impacts of such a location. *Id.* at 428-30. Failure to do so would render the necessity determination vulnerable to an attack on the basis of fraud or abuse of discretion. *Id.* There is no doubt, at least in Michigan, that a determination of necessity for location of a project without first responding to the environmental protection law is indefensible in the face of an abuse of discretion or fraud attack.

A similar conflict between a superior court's power and an administrative agency's power was considered in *Northwestern Pacific Railroad Co. v. Superior Court*.⁸⁹ There the City of Eureka was seeking to condemn a right of way which would require the relocation of petitioner's railroad tracks.⁹⁰ It was held that the Public Utilities Commission was required to determine the viability of the proposed relocation, but no such determination was made prior to the institution of the condemnation proceedings.⁹¹ In commenting on this situation, Justice Edmonds stated:

The complaint in the present case clearly states that removal and relocation of the tracks constitutes an essential part of the relief sought. There is no allegation that approval of the commission has been obtained for such relocation. *Orderly procedure and justice indicate that the approval of the Public Utilities Commission should precede exercise of jurisdiction by the court in a condemnation action requiring relocation of tracks.*

This requirement does not take from the superior courts its fundamental jurisdiction over the subject matter of an eminent domain proceeding. But where such jurisdiction is sought to be exercised in such a manner as to affect substantially the operation of a railroad, it may only be exercised after there has been an administrative approval of the change in use of the railroad's facilities.⁹²

By analogy, a strong case can be made for the proposition that compliance with CEQA is an essential step in the proof of necessity.⁹³

89. 34 Cal. 2d 454, 211 P.2d 571 (1949).

90. *Id.* at 456, 211 P.2d at 572.

91. *Id.* at 458, 211 P.2d at 574.

92. *Id.* (citation omitted and emphasis added).

93. Although no California court has considered this position, in respect to condemnation and environmental laws, several federal cases have adopted this position. In *United States v. 247.37 Acres*, 3 E.R.C. 1098 (S.D. Ohio 1971) the United States instituted an eminent domain proceeding to acquire land for flood control purposes. *Id.* at 1101. Although funds had been appropriated pursuant to an Act of Congress in 1969, no contract had been given and no actual construction had been undertaken. *Id.* The eminent domain proceeding was commenced upon the filing of the Declaration of Taking in December, 1970. *Id.* In January, 1971, the United States was given the right of immediate possession pursuant to an ex parte order. Thereafter, the defendants, in answer to the Declaration, raised seven affirmative defenses, one of which asserted that the condemnor had failed to comply with NEPA in that no EIS had been obtained from the Council of Environmental Quality. *Id.* at 1103-04. The United States made a motion to strike the answer and all of its defenses. *Id.* at 1101. In overruling the motion, the court held that failure to comply with the disclosure requirements of NEPA could be raised as a defense to a condemnation action and that the substance of this defense must be decided by the trial court before condemnation could proceed. *Id.* at 1106. In so doing, the court noted:

In a nutshell, any federal agency which proposes to do anything which "may" have

B. *Compliance with CEQA Prior to Acquisition of Property in Eminent Domain Proceedings*

The final determination of the propriety of the location must be made before proof of necessity can be shown. The condemnor's selection of a final location is dependent upon decisions made during the acquisition stage of the project.⁹⁴ In *Friends of Mammoth*, acquisition of property was held to fall within the scope of CEQA.⁹⁵ A rational extension of this holding suggests that compliance with CEQA should be a precondition to land acquisition in eminent domain proceedings. A determination of environmental impact at this early stage of the project

an impact on man's environment . . . is required to state just what it proposes to do, what the impacts are felt to be to the environmental agency and invoke its expertise *before anything is done* The whole purpose of it [NEPA] is to see to it that the various agencies, before acting, at least obtain the counsel of the expert in the field.

Id. at 1100 (emphasis added).

In *Keith v. Volpe*, 352 F. Supp. 1324 (C.D. Cal. 1972) condemnees whose property was sought for construction of a major freeway brought an action in federal court to enjoin further construction on the project. *Id.* at 1328. Acquisition of land for the project was sought pursuant to a condemnation action brought in state court. The federal court, having found violations of both NEPA's and CEQA's disclosure requirements, granted the injunction until the condemnors could show that, among other things, the EIS and EIR requirements had been fulfilled. *Id.* at 1336-37. In *Gibson v. Ruckelshaus*, 3 E.R.C. 1028 (E.D. Tex. 1971), the court reached a conclusion similar to that in the *Keith* case. Finding a violation of NEPA, the court ordered the acquisition of property to cease until compliance with NEPA as shown. *Id.* These decisions afford support for the contention that compliance with environmental disclosure requirements is a condition precedent to bringing a condemnation action and may be raised as a defense where the condemnor has failed to comply.

The only California case analogous to these federal decisions is *City of Orange v. Valenti*, 37 Cal. App. 3d 240, 112 Cal. Rptr. 379 (1974), wherein the State of California leased a building located in the City of Orange from a private concern for use as a state unemployment office. *Id.* at 242, 112 Cal. Rptr. at 381. Prior to the opening of the office, the City of Orange enacted ordinances requiring special parking and conditional use permits for "public service buildings". *Id.* at 242-43, 112 Cal. Rptr. at 381-82. An injunction was sought by the City of Orange to prevent execution of the lease until the new ordinances were complied with and an EIR has been completed to study the impacts generated by the increased traffic flow. *Id.* at 242, 112 Cal. Rptr. at 381. Defendant's demurrers to all causes of action were sustained by the trial court without leave to amend. *Id.* at 243, 112 Cal. Rptr. at 382. In holding that leave to amend should have been granted as to the cause of action seeking compliance with CEQA, the appellate court found that leasing a building was a project within the scope of CEQA and that compliance therewith was necessary. *Id.* at 247-50, 112 Cal. Rptr. at 384-86. Since the acquisition of land by the device of a lease must be preceded by compliance with CEQA, by analogy, it follows that acquisition through condemnation must also be preceded by compliance with CEQA.

94. See notes 48-56 *supra* and accompanying text.

95. 8 Cal. 3d at 257, 502 P.2d at 1055, 104 Cal. Rptr. at 767.

could avoid subsequent delays and expenses in the condemnation action. This argument is further supported by the California Supreme Court's decision in *Bozung v. Local Agency Formation Commission*.⁹⁶ In that case the court considered the question of whether or not the annexation of unincorporated property by a city⁹⁷ was a project within the scope of CEQA.⁹⁸ It concluded that approval of annexation must be preceded by compliance with the disclosure requirements of CEQA.⁹⁹ This decision was based on the court's finding that *Friends of Mammoth* requires scrutiny not only of a particular act but also of the whole project and its ultimate effect on the environment.¹⁰⁰

Compliance with CEQA prior to acquisition of property and to institution of eminent domain proceedings will avoid the possibility of a superior court's finding of necessity being reversed by a subsequent agency determination.¹⁰¹ Furthermore, the policy of the environmental acts would seem to require compliance at the earliest possible date.¹⁰² In *Jones v. District of Columbia Redevelopment Land Agency*,¹⁰³ the court recognized that proper compliance with NEPA could alleviate this problem. It emphasized:

[Environmental impact] statements were not to be merely *post hoc* environmental rationalizations of decisions already fully and finally made. Rather their purpose is to ensure "meaningful consideration of environmental factors at all stages of agency decision making," and to inform both the public and agencies implicated at subsequent stages of decision-making of the environmental costs of the proposal.¹⁰⁴

96. 13 Cal. 3d 263, 529 P.2d 1017, 118 Cal. Rptr. 249 (1975).

97. *Id.* at 268, 529 P.2d at 1020, 118 Cal. Rptr. at 252. In *Bozung*, the City of Camarillo attempted to annex certain unincorporated property. Prior to such action, approval of a local agency formation commission was required. The duties of such an agency include, among other things, the approval or disapproval of annexation proposals. See CAL. GOVT. CODE ANN. §§ 54773 *et seq.* (West Supp. 1975). A private developer was desirous of constructing a residential development on the property in question and requested along with the City of Camarillo annexation approval for the subject property. The agency approved the request without compliance with CEQA. Plaintiffs, as residents and taxpayers of the city and county, brought the action seeking a writ of mandamus and declaratory relief. The basis of their action was that the agency was required to comply with CEQA prior to approval.

98. 13 Cal. 3d at 278-79, 529 P.2d at 1027-28, 118 Cal. Rptr. at 259-60.

99. *Id.*

100. *Id.* at 279-81, 529 P.2d at 1027-29, 118 Cal. Rptr. at 259-60.

101. See text accompanying notes 76-85 *supra*.

102. See notes 48-56 *supra* and accompanying text.

103. 499 F.2d 502 (D.C. Cir. 1974).

104. *Id.* at 511, quoting *Scientist's Institute for Public Information, Inc. v. AEC*, 481 F.2d 1079, 1091 (D.C. Cir. 1973). California has also recognized this problem by providing that "[a]n EIR may not be used as an instrument to rationalize approval of a project" 14 CAL. ADM. CODE § 15012.

The California Law Revision Commission is also of the opinion that compliance with the environmental laws of the state may have a bearing on the question of necessity.¹⁰⁵ In preparation for a total revision of eminent domain laws, the Commission has been making extensive studies of the provisions relating to necessity.¹⁰⁶ The Commission has recognized that compliance with the requirements of CEQA may be an essential step in the proof of necessity and a condition precedent to a condemnation action.¹⁰⁷ The Commission stated:

[T]he prerequisites to condemnation specified in Section 1240.030 may not be the only prerequisites for public projects. Environmental statements and hearings may be required by statute, relocation plans may be required, or consent of various public agencies may be required. The public necessity elements of Section 1240.030 supplement but do not replace any other prerequisites to condemnation imposed by any other law.¹⁰⁸

Nichols, in his respected treatise on eminent domain, takes the position that failure to comply with the environmental acts casts serious legal doubt upon the validity of the taking.¹⁰⁹ He further emphasizes that the environmental acts have a direct impact upon the exercise of the power of eminent domain in noting:

Principal among the procedures [of environmental acts] is one requiring the filing of an environmental impact statement in connection with any major action, indicating the ramifications of the proposed course of action with respect to the environment. This would appear to include any sizeable project involving condemnation . . . and failure to file an environmental statement would appear to render the validity of the taking open to serious legal question.¹¹⁰

105. 1974 CALIF. LAW REVISION COMMISSION, TENTATIVE RECOMMENDATION RELATING TO CONDEMNATION LAW AND PROCEDURE: THE EMINENT DOMAIN LAW § 1240.030, at 97-98 (1973) [hereinafter cited as TENTATIVE RECOMMENDATION].

106. See generally *id.* at 5-6.

107. See generally *id.* § 1240.030, at 97. Furthermore, before the power of eminent domain could be exercised, the new code provisions would require all those seeking to exercise such power to obtain a resolution of necessity (*id.* § 1245.220, at 144) which would contain a declaration that "[t]he project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury." *Id.* § 1245.230, at 144-45. Given the discussion accompanying notes 73-93 *infra*, one can imply that this resolution should follow the final decision of the lead agency on the environmental questions.

108. TENTATIVE RECOMMENDATION, *supra* note 105, § 1240.030 at 98 (citations omitted).

109. 7 P. NICHOLS, THE LAW OF EMINENT DOMAIN (3d ed. Supp. 1973).

110. *Id.* at § 14.04. A contrary conclusion was reached in *Concerned Citizens United, Inc. v. Kansas Power & Light Co.*, 523 P.2d 755 (Kan. 1974). There, owners of property needed by defendant for construction of a power plant sought to enjoin con-

These authorities suggest that compliance with CEQA is necessary before the location element inherent in the question of necessity can be proved. Since the court's judgment in eminent domain proceedings must await such compliance, it is advisable to refrain from instituting proceedings until the final determination has been made.¹¹¹

denation of their land until the defendant obtained necessary state and federal permits and until compliance with state and federal laws could be shown. *Id.* at 758. The primary thrust of the land owners' argument against the condemnation was that defendant's activities would cause substantial environmental harm to the surrounding countryside. *Id.* at 761. The court first declared that the defendants were lawfully charged with responsibility for determining that the taking was necessary and that the court would not adjudicate that question. *Id.* at 763-64. More importantly, the court found that the Kansas Legislature intended that compliance with other laws could not be raised by condemnees as conditions precedent to the exercise of the power of eminent domain. *Id.* at 767. It should be pointed out that Kansas had no environmental laws similar to NEPA and CEQA. *Id.* Moreover, defendant made extensive studies of all possible environmental impacts which could result from its proposed project. *Id.* at 759-61. The court felt that defendant had adequately explored all environmental impacts and had taken appropriate steps to mitigate any adverse environmental impact. *Id.*

The *Kansas Power* case seems patently irreconcilable with the reasoning of the cases which have held that compliance with federal and local environmental laws is a condition precedent to condemnation. Further, in the case of *TVA v. Three Tracts of Land*, 377 F. Supp. 631 (N.D. Ala. 1974), the court held that acquisition of title by T.V.A. was properly determined to not be a federal activity which required the filing of an impact statement. *Id.* at 638. These cases are clearly *contra* to the express policy of the environmental acts and as such should not be followed where an environmental statute is involved.

111. For a contrary view, see note 110 *supra*. In *Concerned Citizens United, Inc. v. Kansas Power & Light Co.*, 523 P.2d 755 (Kan. 1974), it was conceded that the current zoning of the property would not permit the use for which the condemnor sought the property. The court implicitly accepted the Attorney General's argument that, should a rezoning be denied by the appropriate administrative authority, "then a conflict would exist between the exercise of the delegated powers of eminent domain and zoning." *Id.* at 767. Here, then, is presented the same administrative-judicial conflict raised in the text. See text accompanying notes 73-93 *supra*. Although the court recognized the conflict, it failed to resolve it. The ultimate resolution of the question was left to the legislature. This failure to resolve a fundamental conflict allowed the court to conclude that, in the absence of any express legislative declaration with respect to zoning as a condition precedent to the exercise of eminent domain, the failure to change the zoning could not be asserted by condemnees as a defense to the condemnation action. *Id.* at 768.

In *Seadade Industries, Inc. v. Florida Power & Light Co.*, 245 So. 2d 209 (Fla. 1971), the court attempted to resolve the question of whether or not independent agency approval of a project is a condition precedent to exercise of the power of eminent domain. *Id.* at 210-11. The court came closer to ultimate resolution than did the Kansas Supreme Court by holding that where independent governmental agencies charged with safeguarding natural resources must ultimately approve a project involving condemnation, the condemning authority must demonstrate a reasonable probability of obtaining approval. It must also demonstrate that the condemnation will not result in irreparable harm should the approvals be denied. *Id.* at 214. This solution, however, still leaves

CONCLUSION

It is evident that the courts and other authorities have now recognized the potential problems arising from the interaction of the environmental acts and eminent domain law. However, the provisions of neither the environmental acts nor the law of eminent domain provide solutions to these problems. In those situations where condemnation of private property falls within the disclosure requirements of CEQA the most efficient method to avoid delays, increased costs, and the abrogation of a superior court's ruling is to require full compliance with CEQA prior to the institution of eminent domain proceedings. This could be accomplished if a provision to this effect were written into the new eminent domain law.

Sheldon Chernove

unresolved the result of the withholding of agency approval subsequent to condemnation of the property.

Analogous objections were made to plaintiffs' action in *Bozung v. Local Agency Formation Comm'n*, 13 Cal. 3d 263, 529 P.2d 102, 118 Cal. Rptr. 249 (1975) (see notes 94-100 *infra* and accompanying text). Basically, the argument was that the requirement of an EIR at this point was premature and wasteful. The court concluded that it was the initiating act of a project that might significantly affect the environment and not the culminating act that set the operative sections of CEQA into action. The court concluded that preparation of an EIR at the earliest possible moment in the planning stages of a project was necessary. *Id.* at 282, 529 P.2d at 102, 118 Cal. Rptr. at 262, *citing* 14 CAL. ADM. CODE § 15013 (1973). All statutes should be harmonized, (*id.* at 274 n.7, 529 P.2d at 1024 n.7, 118 Cal. Rptr. at 256 n.7) and the conflicts encountered in the above cases are, at least in California, resolved in favor of viewing CEQA compliance as a condition precedent to condemnation. It is the intent of the legislature that the impact of a project upon the environment be studied at the *earliest* possible moment in a project's life. When harmonizing that with the power of eminent domain, it is evident that compliance with CEQA's EIR procedures must be viewed as a condition precedent to condemnation. The exercise of eminent domain is the initiating act of a project which may have significant impact upon the environment and, under the *Bozung* analysis should trigger CEQA's EIR procedures.

