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Environmental Law - State and Federal Environmental Impact Statements - What Type of Activity Constitutes a Project or Major Action - Friends of Mammoth v. Board of Supervisors of Mono County

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CASE NOTE

ENVIRONMENTAL LAW—State and Federal Environmental Impact Statements—What Type of Activity Constitutes a Project or Major Action. Friends of Mammoth v. Board of Supervisors of Mono County, 8 Cal. 3d 1, 500 P.2d 1360, 124 Cal. Rptr. 16, as modified, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972).

Action was brought on petition of administrative mandamus, attacking the grant of a use permit by Mono County Board of Supervisors to International Recreation, Ltd. for proposed construction of condominiums, shops, and a restaurant. The California Supreme Court stated that the California Environmental Quality Act of 1970¹ required an environmental impact report of all state agencies on all proposed state projects they intend to carry out which may have a significant effect upon the environment. The court held that the language “any project they intend to carry out” includes private activity for which a permit or other similar entitlement is required.²

This case is significant because it construes language similar to that found in acts in force in Montana,³ New Mexico,⁴ North Carolina,⁵ Washington,⁶ Wisconsin,⁷ and the National Environmental Policy Act,⁸ and is the first high court ruling on such language. The purpose of this note is to examine legislation, cases, and guidelines to determine what is meant by the words “project”, “major action”, and other similar language. This note is divided into several parts: part I will examine the principal case, the subsequent legislation it prompted, and the guidelines issued pursuant to that later legislation; part II will examine NEPA, cases construing the language “major federal action” found in NEPA, and the guidelines issued pursuant to NEPA; part III will look at

1. CAL. PUB. RES. CODE §§ 21000-21107 (West Supp. 1972). [Hereinafter referred to as EQA].
2. 8 Cal. 3d 1, 500 P.2d 1360, 1366, 104 Cal. Rptr. 16 (1972).
3. MONT. REV. CODES ANN. §§ 69-6501 to -6517 (Supp. 1971).
4. N.M. STAT. ANN. §§ 12-20-1 to -7 (Supp. 1971).
5. N.C. GEN. STAT. §§ 113A-1 to -20 (Cum. Supp. 1971).
6. WASH. REV. CODE ANN. §§ 43.21C.010 to -.060 (Supp. 1971).
7. WIS. STAT. ANN. § 1.11 (found in Wis. Legislative Service printed in 1972).
8. 42 U.S.C. §§ 4321-47 (1970) [Hereinafter referred to as NEPA].

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the various state acts in light of the similarities and differences in language between them and the California Act and NEPA. It will also draw conclusions as to the possible influence of California and federal law upon these state acts.

I. *Friends of Mammoth* AND ITS ATTENDANT LEGISLATION AND GUIDELINES

The specific section of EQA construed by the court was Section 21151. It states:

The legislative bodies of all cities and counties which have an officially adopted conservation element of a general plan shall make a finding that any project they intend to carry out, which may have a significant effect on the environment, is in accord with the conservation element of the general plan. All other local governmental agencies shall make an environmental impact report on any project they intend to carry out which may have a significant effect on the environment and shall submit it to the appropriate local planning agency as part of the report required by Section 65402 of the Government Code.⁹

The court stated that Mono County did not have a conservation element of a general plan; hence the first sentence of the section was not applicable. An impact report would be required only if the activity was a "project" within the meaning of the second sentence.

The court said nowhere in the act was the word "project" defined, but their task was "aided somewhat" by the inclusion in the Act of Legislative Intent¹⁰ and Additional Legislative Intent¹¹ sections. The reading of these sections along with the one under consideration led the court to conclude, "[T]he Legislature intended to include within the panoply

9. CAL. PUB. RES. CODE § 21151 (West Supp. 1972). An identical section is not found in any of the other state acts cited. However, the language construed by the court also occurs in Section 21100 of EQA, a section similar to those found in the other state acts. Presumably the construction given by the court would be uniform and hence the discrepancy is not significant except in a narrowly technical sense.

10. CAL. PUB. RES. CODE § 21000 (West Supp. 1972).

11. *Id.* § 21001. These statements are general in language and for the most part indicate a legislative concern with the deterioration of the California environment. Typical is subsection (a) which states that the legislature declares it is the policy of the state to "develop and maintain a high-quality environment now and in the future, and take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state."

of the act's provisions private activities for which a permit, lease or other entitlement is necessary."¹²

The court laid particular emphasis upon Section 21000 (g)¹³ concluding that the word "regulates" as therein used was evidence that the legislature contemplated inclusion of governmental, as well as proprietary, functions within the scope of the Act.

The court then considered the defendant's contention that the word "project" ought to be read together with the words "they intend to carry out". This reading, the defendant's claimed, must lead to the conclusion that the scope of the Act was limited to public works. The court noted the lack of definition of terms in the Act itself, the Legislative Intent, and the inconclusive nature of the dictionary definition of those terms. For guidance the court turned to the National Environmental Policy Act. The court pointed out the similarity in language of the two acts and the timing of their passage, concluding, "[M]uch of the phraseology of the EQA is either adopted verbatim from or is clearly patterned upon the federal act."¹⁴ This made NEPA and its guidelines significant.

Having found that NEPA uses the word "actions" whereas EQA uses the word "projects" the court turned to the federal guidelines.¹⁵ In them, "projects" are listed as subsets of "actions". Nevertheless, "projects" includes leases, permits, certificates, or other entitlements for use. The court then concluded, given legislative knowledge of federal guidelines, that the legislature must have intended that the word be so used. The court held that "projects" included the issuance of leases, permits, or other entitlements for use.

12. 104 Cal. Rptr. 16, 500 P.2d 1360, 1366, *modified*, 104 Cal. Rptr. 761, 502 P.2d 1049 (Sup. Ct. 1972).

13. CAL. PUB. RES. CODE § 21000(g) (West Supp. 1972):
The Legislature finds and declares as follows:

(g) It is the intent of the Legislature that all agencies of the state government which regulate activities of private individuals, corporations, and public agencies which are found to affect the quality of the environment, shall regulate such activities so that major consideration is given to preventing environmental damage.

14. Friends of Mammoth, *supra* note 12, at 1369.

15. 35 Fed. Reg. 7390, *superseded by*, 36 Fed. Reg. 7724 (1971).

Having broadly interpreted "projects", the court said that the granting or denying of a permit is an act which the government can carry out, thus disposing of the public works argument.

Justice Sullivan dissented on the grounds that the language of the statute was plain, that the court was to follow this plain meaning, and the language "projects they intend to carry out" clearly referred to only public works.

It should be noted that nowhere in the original opinion were the words "which may have a significant affect on the environment" construed. In its later modified opinion¹⁶ the court called attention to this fact, stating that it had not dealt with that language because it had not been shown whether or not the proposed activity would have such an affect. The court left determination of that issue to future proceedings, legislation, or administrative action. Also in that modified opinion, issued November 6, 1972, the court refused to make its holding prospective only, thus bringing within the sweep of the original decision those private projects commenced after November 23, 1970 (the effective date of EQA), but before September 21, 1972 (the date of the original *Friends of Mammoth* decision).

Not unexpectedly, *Friends of Mammoth* caused an uproar in California. It attracted the attention of the national press which highlighted the effect of the decision on builders, bankers, and unions, among others.¹⁷

At this point, the California Legislature took action. On December 5, 1972, the amended EQA became law.¹⁸ Far more comprehensive than the original act, only those sections which concern the meaning of the phrase "projects they intend to carry out which may have a significant affect upon the environment"¹⁹ need concern us here. In this regard, the new EQA codifies *Friends of Mammoth* in part, overrides it in part, and goes far beyond it in great measure.

16. 104 Cal. Rptr. 761, 502 P.2d 1049 (Sup. Ct. 1972).

17. The Wallstreet Journal, Oct. 9, 1972, at 1, col. 1.

18. CAL. PUB. RES. CODE §§ 21000-21174 (7 West's Cal. Legis. Serv. 2638, 1972).

19. *Id.* §§ 21151, 21065, 21169, 21170, 21080(b), 21172, 21083, 21084, 21085.

Legislative approval of *Friends of Mammoth* can be seen in two sections. Section 21151,²⁰ the section originally considered by the court, was amended. That section's coverage was extended from the original to include all government agencies, and not simply those cities and counties having a general conservation plan. Significant to this discussion is the language found in that section "or approve". This language would seem to indicate that the regulatory function of state agencies is also included, a position consistent with the holding in *Friends of Mammoth*.

The second, and most important section approving *Friends of Mammoth* defines "project". It states:

"Project" means the following:

- (a) Activities directly undertaken by any public agency.
- (b) Activities undertaken by a person which are supported in whole or in part through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies.
- (c) Activities involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.²¹

Subsection (c) expressly adopts the holding of *Friends of Mammoth*. Taken together with the words "or approve" in amended Section 21151, it is clear the Legislature approved the holding in the principal case insofar as it related to the definition of "project".

But having rendered a pound of flesh, the legislature ordained that not a jot of blood be spilt.

First, the legislature ratified those projects commenced after the effective date of the original EQA which had not been litigated.²² As to those which were in the courts, those which had been commenced in good faith reliance and had been already accompanied by substantial construction were also ratified. Those projects which had been litigated and

20. *Id.* § 21151.

21. *Id.* § 21065.

22. *Id.* §§ 21169, 21170.

had been reduced to final judgment were not ratified. The legislature made *all other* sections of the act effective as of April 5, 1973.

Second, the legislature exempted ministerial activities,²³ emergency projects,²⁴ and emergency repairs to public service facilities necessary to maintain service.²⁵

Third, the legislature empowered the Resources Agency to draw up guidelines, to include projects, arranged by class, which would be exempt on the grounds that they had been found not to have a significant effect upon the environment.²⁶

The net effort of this new legislative scheme is to shift emphasis away from the word "project". The issue of whether or not an impact report is required depends upon the answers to several narrower questions. They are:

1. Is the proposed activity a legislatively exempt one?
2. If not, is the proposed activity a "project" within the meaning of the Act?
3. If the proposed activity is a "project", is that activity administratively exempt by determination of the Resources Agency?
4. If the proposed activity is a "project", and not exempt, will it have a significant affect upon the environment?

The guidelines aid in answering these questions.²⁷ They were issued on February 3, 1973 and are comprehensive. They reinforce the legislative scheme in that they too emphasize factors other than whether or not an activity is a "project". Rather, they emphasize significant affect upon the environment.

This approach can be seen in those sections which deal with the administrative exemptions determined by the Re-

23. *Id.* § 21080(b).

24. *Id.* § 21172.

25. *Id.* § 21085.

26. *Id.* §§ 21083, 21084.

27. CAL. ADMIN. CODE §§ 15000-15116 (1973). A copy of these guidelines can be had by sending \$1 plus tax to Department of General Services, State of California, Documents Section, P.O. Box 20191, Sacramento, California 95820.

sources Agency.²⁸ A reading of the classes exempted indicates that the Resources Agency had in mind those projects which were trivial and routine.

Similarly, those sections which deal with significant affect upon the environment leave out those projects which might ordinarily be expected to have such an effect, but due to circumstances, will not.²⁹ In those cases in which conditions are found that will have a significant effect upon the environment, a mandatory finding of significant effect is required and an impact report must follow.³⁰

Thus, the new EQA begins to look strangely like NEPA. That is, the thrust of EQA has been molded by the legislature

28. CAL. ADMIN. CODE §§ 15100-15112 (1973). These categorical exemptions are divided into 12 classes. A brief sketch of each follows:

Class 1 refers to existing facilities. It consists of the operation, repair, maintenance or minor alteration of existing public or private structures facilities, mechanical equipment etc.

Class 2 refers to replacement or reconstruction. It consists of replacement or reconstruction of existing structures and facilities where new structures will be located on the same site as the structure replaced and will have substantially the same purpose and capacity as the structure replaced.

Class 3 refers to new construction of small structures. It consists of single, new facilities or structures typified by single family dwellings, motels, duplexes etc. of not more than 4 dwelling units, and stores, offices, and restaurants designed for an occupancy load of 20 persons or less, as well as water main, sewage, electrical, gas and other utility extensions.

Class 4 refers to minor alterations to land and consists of minor public or private alterations in land, water, and/or vegetation. It is typified by grading with a slope of less than 10%, new gradening or landscaping, and filling of previously excavated land.

Class 5 refers to alterations in land use limitations, exclusive of zoning, and is limited to such alterations if minor.

Class 6 refers to information collection and consists of basic data collection, research, experimental management and resource evaluation activities which do not result in a serious or major disturbance of an environmental resource.

Class 7 refers to regulatory actions for protection of natural resources and consists of actions taken by regulatory agencies to assure that maintenance, restoration, or enhancement of a natural resource.

Class 8 refers to regulatory actions for the protection of the environment and consists of actions taken by regulatory agencies to assure maintenance, restoration, enhancement, or protection of the environment.

Class 9 refers to inspections and consists of activities related to that function.

Class 10 refers to loans and exempts those loans made by the Department of Veterans affairs under the Veterans Farm and Home Purchase Act of 1943.

Class 11 refers to accessory structures and consists of construction or placement of minor structures accessory to existing commercial, industrial, or institutional facilities. It is typified by on premise signs and small parking lots.

Class 12 refers to surplus government property sales and consists of sales of surplus government property except for parcels of land.

29. CAL. ADMIN. CODE § 15083 (1973).

30. CAL. ADMIN. CODE § 15082 (1973).

and the Resources Agency to emphasize effect upon the environment, limiting its coverage to only those projects which are not routine and trivial in nature. NEPA language apparently contemplates similar results when it states that an environmental impact statement will be required only of those "major federal actions significantly affecting the quality of the human environment." An analysis of this language is the topic of part II.

II. NEPA, CASES, AND GUIDELINES

On January 1, 1970, the National Environmental Policy Act became law. The section of that Act with which we are concerned is as follows:

[A]ll agencies of the Federal Government shall—

(c) 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—³¹

Nowhere in the act are those words defined. Nor is the legislative history³² particularly helpful. The guidelines do address themselves to the meaning of the word "actions" but warn that those listed do not exhaust the possibilities.³³ Neither the act nor the guidelines supply a test for determining what a "major federal action" is. For this one must turn to the case law.

Case law is sparse. Some courts do not discuss the issue at all, preferring to rest their decisions upon other grounds.³⁴

31. 42 U.S.C. 4332(2) (C) (1970).

32. S. REP. NO. 91-296, 91st Cong., 1st Sess. (1969); H. R. REP. NO. 91-378, 91st Cong., 1st Sess. (1969); CONF. REP. 91-765, 91st Cong., 1st Sess. (1969); CONG. REC. Vol. 115 (1969).

33. *Supra* note 15.

34. The following lists of cases are not intended to be exhaustive; they are illustrative only. *Pennsylvania Environmental Council, Inc. v. Bartlett*, 454 F.2d 613 (3rd Cir. 1971) (NEPA not retroactive); *Investment Syndicates, Inc. v. Richmond*, 318 F. Supp. 1038 (D. Ore. 1970) (NEPA not retroactive); *McQueary v. Laird*, 449 F.2d 608 (10th Cir. 1970) (NEPA creates no substantive right to raise jurisdiction challenging military defense facility); *Miltnerberger v. Chesapeake and Ohio Railway Company*, 450 F.2d 971 (4th Cir. 1971) (NEPA not applicable to sale of property by private corporation receiving federal aid); *Concerned Citizens of Marlboro v. Volpe*, 459 F.2d 332 (3rd Cir. 1972) (Federal involvement for purposes of NEPA terminated with governmental approval and commitment of funds for highway construction).

Others assume the activity is such an action, but give no basis for that assumption.³⁵ Others were not faced with the problem, since it was conceded by the parties that the activity was a "major federal action".³⁶

Fortunately, the issue has been aired by some courts. From these decisions it is possible to extrapolate a working definition of "major federal action".

The finest treatment of the problem occurs in *Julis v. City of Cedar Rapids*.³⁷ In that case, the plaintiffs sought preliminary injunctive and declaratory relief on grounds that certain street construction in Cedar Rapids, Iowa, was in violation of NEPA since the defendant had failed to prepare an impact statement. The case is significant because the court states the issues and analyzes them clearly. Not all courts have followed this approach, and for this reason, the opinion in *Julis* will be quoted at length:

The work . . . involves a total expenditure of \$651,515.55, \$313,089.99 being the federal contribution. The construction area encompasses fourteen blocks. The undertaking primarily eliminates a bottleneck by widening a portion of an existing major traffic artery from two to four lanes and includes traffic signal installations and a pedestrian overpass.

. . . NEPA requires the filing of an environmental impact statement for "major Actions significantly affecting the quality of the humn environment." (Court's emphasis) Therefore the threshold question for the court, involving a twofold determination, is whether the project is a "major federal

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35. *Daly v. Volpe*, 326 F. Supp. 868 (W.D. Wash. 1971) (NEPA applicable to construction of interstate highway); *Izaak Walton League of America v. Schlesinger*, 337 F. Supp. 287 (D.D.C. 1971) (NEPA applicable to Atomic Energy Commission issuance of an interim operating license); *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971) (NEPA applicable to A.E.C. procedural rules).
36. *Fayetteville Area Chamber of Commerce and Interstate 95 Committee v. Volpe*, 463 F.2d 402 (4th Cir. 1972) (interstate highway); *Upper Pecos Association v. Stans*, 452 F.2d 1233 (10th Cir. 1971) (grant of funds by economic development administration); *Greene County Planning Board v. Federal Power Commission*, 455 F.2d 412 (2nd Cir. 1972) (authorization for construction of high voltage line); *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827 (D.C. Cir. 1972) (sale of oil and gas leases to tracts of submerged lands off Louisiana coast).
37. 349 F. Supp. 88 (1972).

action” and if “major”, whether it significantly affects the quality of the human environment. Absent either element, the act does not apply. (Emphasis added).

. . . .

. . . [T]he inclusion of the term “major” raises the obvious inference that not every federal action was meant to be included. Congress evidently intended to exclude from consideration the myriad minor activities with which the federal government becomes involved.

. . . Webster’s Third International Unabridged Dictionary defines “major” as “. . . greater in dignity, rank, importance, or interest: SUPERIOR . . . greater in number, quantity, or extent: LARGER . . . notable or conspicuous in effect or scope: CONSIDERABLE, PRINCIPAL . . .” (Court’s emphasis). It is the view of the court that by using the term “major” Congress reasonably intended to limit the Act to those federal actions of superior, larger and considerable importance, involving substantial expenditure of money, time and resources.³⁸

The court then determined that the proposed construction was not “major” and hence NEPA was not applicable. The court rested its decision upon the fact that little land was to be acquired, no parklands were being taken, no one was being displaced from his home, and the Government expenditures totalled only approximately \$300,000.

The rationale of the court is important because it senses the interrelationships of the words used by Congress. That is, that there is a sequence of determinations to be made before the impact statement requirement is triggered. If one were to schematize these questions, the following arrangement is suggested:

1. Is the proposed activity “major” as outlined in *Julis*?
2. If “major”, is the proposed activity “federal”?

38. *Id.* at 89.

3. If "major" and "federal", is the proposed activity an "action" as suggested in the CEQ guidelines?
4. If the proposed activity is a "major federal action", will it have a significant effect upon the environment?

Julis adequately answers the first question. Other courts have made similar determinations, but on other grounds. In *Certain Named Members of the San Antonio Conservation Society v. Texas Highway Department*,³⁹ the Fifth Circuit Court of Appeals had before it a case involving highway construction. Total costs of the project were \$18,000,000, initial costs being \$12,600,000. Because of these figures, the court said that it had no difficulty in characterizing the project as "major federal action". The weakness of the case lies in the fact that the amount of money expended seems to go to the question of "major" and implicit is the assumption that if the federal government is spending that amount, it is "federal", but neither of these propositions is made clear by the court.

The second question has also been analyzed by the courts. In *City of Boston v. Volpe*,⁴⁰ injunctive relief was requested regarding the construction of a stretch of road by the Massachusetts Port Authority. The court said that the determination of *when* a project becomes federal is a factual one. The application for federal funds, adoption of federal standards and specifications in the hope of qualifying for federal assistance, or the tentative approval of a project by the federal government does not make the activity federal. The court seems to be saying that for a project to be "federal" there must be actual federal participation in the project, not merely anticipated participation.

In *Ely v. Velde*,⁴¹ action was brought to enjoin construction of a penal facility being constructed with assistance of the Law Enforcement Assistance Agency pursuant to the Omnibus Crime Control and Safe Streets Act of 1968. When

39. 446 F.2d 1013 (5th Cir. 1971).

40. 464 F.2d 254 (1st Cir. 1972).

41. 451 F.2d 1130 (4th Cir. 1971).

discussing the question of "major federal action", the court said that, in view of the federal agency's overall involvement in the promotion and planning of the facility, the activity was a "major federal action".

Thus *City of Boston* and *Ely* stand for the proposition that to make an activity "federal", there must be actual federal participation and involvement.

Federal involvement can take many forms. In *Davis v. Morton*,⁴² the Tenth Circuit Court of Appeals held that federal approval of a lease of Indian lands constitutes "major federal action". The court reasoned that federal liability might attach on Indian lands in the absence of agreement to the contrary, and hence the fact that the United States was a signatory to the contract made it more than a mere disinterested party.

From the cases so far analyzed, this result seems hard to justify. First, it is hard to see how federal approval of a lease of Indian lands constitutes a "major" activity of the federal government based on the rationale of the *Julis* case. Second, it seems doubtful that the activity is even an "action" since it is really the Indians who are granting the lease and any "action" is between them and the developers who wished to build on Indian land. From this standpoint, the federal government is merely a bystander. Third, the court hinges its activity on liability but such liability could be expressly provided for. If this is so, does the express agreement not to hold the government liable make it any less a "major federal action"? The court is not clear.

Actually, what the court seems to mean is that anything the Indians do, if it involves the federal government acting in its position as trustee of the Indian lands, makes the Indian action federal action. This seems to be the proposition for which this case stands.

The third question—what is an action?—is answered by the CEQ guidelines⁴³ and needs no analysis here.

42. 469 F.2d 593 (10th Cir. 1972).

43. 35 Fed. Reg. 7390, *superceded by*, 36 Fed. Reg. 7724 (1971):

Actions included. The following criteria will be employed by

Having answered those three questions, it seems proper to posit a definition of "major federal action". It is suggested that the following is a proper one:

A major federal action is an activity, illustrated by the guidelines of the Council on Environmental Quality, which is of considerable importance, characterized by federal participation, and involving substantial expenditure of money, time, resources, or planning expertise.

It is suggested that only if an activity satisfies this definition should the last question be asked: will that "major federal action" have a significant affect upon the environment?

However, some courts get confused. An example of this can be seen in *Scherr v. Volpe*.⁴⁴ In that case, the court held that a highway construction project was a "major federal action". This was obvious, the court said, because lanes and interchanges would be added, access control would be altered, and additional right of way would be acquired. What the court impiles is that a major alteration of the landscape is a "major federal action". But this rationale is misplaced because alteration of the landscape goes to significant affect on the environment and not whether alteration of the landscape in and of itself constitutes such an action.

agencies in deciding whether a proposed action requires the preparation of an environmental statement:

(a) "Actions" include but are not limited to:

(i) Recommendations or favorable reports relating to legislation including that for appropriations. The requirement for following the section 102(2)(C) procedure as elaborated in these guidelines applies to both (i) agency recommendations on their own proposals for legislation and (ii) agency reports on legislation initiated elsewhere. (In the latter case only the agency which has primary responsibility for the subject matter involved will prepare an environmental statement.) The Office of Management and Budget will supplement these general guidelines with specific instructions relating to the way in which the section 102(2)(C) procedure fits into its legislative clearance process;

(ii) Projects and continuing activities: directly undertaken by Federal Agencies; supported in whole or in part through Federal contracts, grants, subsidies, loans, or other forms of funding assistance; involving a Federal lease, permit, license, certificate, or other entitlement for use;

(iii) Policy, regulations, and procedure-making.

44. 466 F.2d 1027 (7th Cir. 1972).

A similar analysis is found in *National Helium Corporation v. Morton*.⁴⁵ That case involved the cancellation of a helium conservation contract by the Secretary of Interior. The court said that it was undeniable that the Act compelled Interior to comply with its provisions when action was being taken having to do with a depletable resource. The court was not clear if such action was "major" because of the work involved, or "federal" because of the federal interest in such resources, or if it was an "action" covered by the guidelines. The implication of the court's reasoning is that an impact statement is required because such actions would have a significant affect on the environment. Again, this question is misplaced until the prior determination of "major federal action" is made.

But if one discounts these opinions, one is left with the understanding that by approaching the problems in sequence, Congress intended that only those activities which are major and federal require an impact statement, and *only* if such activities would have a significant affect on the environment.

The result then, is approximately the same under both federal and California law. Both require a sequential approach, with an impact statement or report being required only if the sequence has been followed to its conclusion. The laws differ in the method of working through this sequence, the federal law being dependent upon proper judicial application of Congressional language, whereas the California law depends primarily upon agency determinations pursuant to an extensive set of guidelines.

With this in mind, attention will now turn to the state acts.

III. THE STATE ACTS—CONCLUSIONS

A. The State Act Language

Montana, North Carolina, New Mexico, Washington, and Wisconsin have acts similar to both EQA and NEPA.⁴⁶ In those sections relevant to this note, each requires an impact

45. 455 F.2d 650 (10th Cir. 1971).

46. See notes 1 thru 7 for citations to these acts.

statement or report to be made by an agency when certain of its activities significantly affects the environment. However, the language describing these activities differs from act to act.⁴⁷

The language in NEPA, the Washington act, and the New Mexico act are virtually identical. The Wisconsin act differs from these insofar as it incorporates by reference the CEQ guidelines. Montana's act adds the words "projects" and "programs". The North Carolina act differs significantly from the other in that it restricts "actions" to those involving expenditures of public moneys. The original California EQA differs from all of the above in that it used the language "projects they intend to carry out" rather than "major actions".

B. Conclusions

From a technical standpoint, the Acts of Washington, New Mexico, and Wisconsin are so close to the language of NEPA as to make reasonable the conclusion that these states ought to follow the federal lead in interpreting their acts. This conclusion is predicated upon the assumption that the legislature closely copied NEPA and would therefore favor

47. Compare 42 U.S.C. § 4332(2) (C): "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—" [and] N.M. STAT. ANN. § 12-20-6 (C): "include in every recommendation or report on proposals for legislation and other major state actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on:" [and] WASH. REV. CODE ANN. § 43.21C.030(2) (C): "Include in every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the environment, a detailed statement by the responsible official on:", with Wis. STAT. § 1.11(2)(c): "Include in every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the human environment, a detailed statement, substantially following the guidelines issued by the United States Council on Environmental Quality . . . by the responsible official on:" [and] MONT. REV. CODES ANN. § 69-6504(b) (3): "include in every recommendation or report on proposals for projects, programs, legislation and other major actions of state government significantly affecting the quality of the human environment, a detailed statement on—" [and] N.C. GEN. STAT. ANN. § 113A-4(2): "Any state agency shall include in every recommendation or report on proposals for legislation and actions involving expenditure of public moneys for projects and programs significantly affecting the quality of the environment of this State, a detailed statement by the responsible official setting forth the following:" [and] CAL. PUB. RES. CODE § 21100: "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 affect on the environment. Such report shall include a detailed statement setting forth the following:" (All emphasis added).

a federally flavored interpretation as well. The same might be said of Montana, assuming that the addition of the words "projects and programs" is not a significant broadening of the generic term "actions". Important here is the fact that all of these state acts use the word "major" which is a limiting adjective, a limitation not found in the California EQA when *Friends of Mammoth* was decided.

Uniformity with federal law takes on added significance in states such as Washington, New Mexico, and Montana where federal land holdings are extensive.

North Carolina stands by itself. Its language is unlike any of the others and the restrictions of "actions" to those involving expenditures of public moneys points directly to public works, a range more limited than either the California or federal law.

Balancing the language argument, however, is the prestige of the California Supreme Court. As noted at the outset of this note, no other state supreme court nor the United States Supreme Court has yet ruled on such language. This fact, added to the confusion in interpretation of NEPA in the district and appellate courts in the federal system militates in favor of the authority of *Friends of Mammoth*.

One additional technical factor to be taken into account is the weight the court in *Friends of Mammoth* gave to the legislative intent accompanying the EQA. This policy basis would, of course, be lacking in any other state act since each legislature makes its own policy statement. Thus, the cornerstone of *Friends of Mammoth* would possibly be lacking in any other state.

But if one departs from the technical aspects of the *Friends of Mammoth* decision and the state acts themselves, other factors come into play.

Two factors are suggested as important. The first of these is certainty in the law. In California, by virtue of the later legislation and the extensive guidelines, the thrust and policy of the law is clear. In addition, procedures to be followed to comply with the law are also readily ascertainable.

The federal law, on the other hand, is not clear as has been pointed out previously. But to reach this desired end of clarity, the step had to be taken by the California Supreme Court which forced the California legislature to clarify its meaning. The result was the present scheme. And this scheme is the second factor.

As pointed out, *supra*, the federal law differs from the California law in that it is judicially administered insofar as determinations of "major actions" are concerned. California, however, is administered by agency. A court, in deciding the scope of the words "major actions" must take into account the possible legislative result of a re-working of the law. It is suggested that an administrative handling of the problem, although threatening bureaucratic tie-ups, would at least be uniform in application, a feature not present in the federal administration of NEPA.

To summarize: The *Friends of Mammoth* decision is persuasive in that it is the first high court decision rendered on the coverage of environmental quality acts like those under discussion. Its persuasive power is limited by two factors: first, the language construed does not appear in any other state act nor NEPA; and second, the court relied heavily upon a declaration of legislative intent peculiar to California's Act.

The federal interpretation, on the other hand, enjoys the status of being based upon the model for the state acts and the interests of uniformity are strong. However, NEPA as it has been interpreted suffers from confused approaches by the courts. Because of this, the body of federal law makes a difficult model to follow, even by those state supreme courts which might be willing.

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