PLACEMENT AND FUNCTIONS OF
STATE ENVIRONMENTAL ENTITIES

Statement for Environmental Council
Public Hearing, 5 August 1982

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Speaking in my capacity as Director of the Environmental Center, a unit of the University intimately associated in the past with the Environmental Council, the Office of Environmental Quality Control, and the Environmental Quality Commission. I commented orally at the public meeting held on 5 August concerning the placement and functions of those three State environmental entities. I was not able to prepare a written statement, because the announcement of the meeting and its agenda has not yet reached the Center and I obtained a copy only late that afternoon. This written statement is submitted to summarize and confirm my oral comments.

Multiplicity of entities

The most general of the concerns indicated in the meeting announcement is the public confusion as to the existence of, and distribution of functions among, the three specifically environmental entities of the State, the Office of Environmental Quality Control (OEQC), the Environmental Council, and the Environmental Quality Commission (Concern 2). Regardless of the extent to which there are undue duplications of their functions or inefficiencies resulting from internal unclarity as to the division of the functions among them (Concern 1), the public confusion is so great that a reduction in the number of the entities is desirable unless there are substantial reasons for not centralizing in one or two entities the functions now distributed among the three.

The entities may be considered of two primary functional types and of two primary compositional types, but among them there is not correspondence between the functional and compositional typification:

The OEQC is an office with a paid staff and director having a primarily executive function, although an unusual one because much of its power is exercised by persuasion;

The Council is a committee of unpaid citizens having advisory powers;
The Commission is a committee of unpaid citizens to which is assigned a very small staff, having a primarily executive function.

In environmental matters, both public advisory functions and executive functions are of great importance. The former cannot be provided adequately by an office with a paid staff and director, and the latter cannot be provided effectively by an unpaid committee (unless it has attached to it an adequate paid staff). Hence there is substantial reason for retaining at least two entities of different compositional types and distributing the functions exercised by the present three entities among two entities, one an office with a paid staff and the other a committee of citizens. To avoid, initially, semantic implications of perpetration of any of the present entities, I will refer to the first kind of entity as an agency and the second as a committee.

There seems to be no substantial problem with the distribution of functions between the OEQC and Council. Although at the time the State Environmental Impact (EIS) system was established, the Legislature considered that adding the responsibility for the management of the system (an executive function) to the other executive functions of the OEQC was unwise, the combination does not now seem to be of concern. The question, then, is how the EIS-management functions now exercised by the Commission might be distributed between the agency that will exercise the OEQC functions and the committee that will exercise the Council functions.

**EIS-system management**

The EIS-system management functions now nominally exercised by the Commission are comprised of two types:

a) Policy determination, including: i) the making of rules for the operation of the EIS system, ii) the establishment of general exemptions from environmental impact assessment requirements and approval of agency exemption lists, and iii) the hearing of appeals on EIS determination; and

b) Operation of the system including: iv) general oversight; v) mechanics of operation; and vi) public notification.

The responsibility for EIS determinations is highly decentralized. There is, however, an additional point of centralization besides the Commission that should be taken into account. The OEQC also serves as a center in: a) the technical review of EIS's and similar documents (included henceforth as EIS's), and b) the advising of agencies and the governor concerning the acceptability of EIS's.

The operation of the EIS system is surely better exercised by an agency than a committee. The technical review of EIS's and provision of advice as to their adequacy, because they require technical environmental competence, also is better exercised by an agency than a committee.

In my opinion, each of the three policy determination functions involves a combination of technical environmental competence and advice representative of public opinion. None of the functions can well be exercised, then, by either an agency or a committee alone, but each should be exercised by an agency taking into account the advice of a committee or by a committee taken into account the advice of an agency.
Identified alternatives

Among the alternatives identified in the meeting announcement, neither maintenance of the "Status Quo" nor the realignment of the present entities would reduce the number of entities. Identification of the other alternatives as representing either the merger of the Commission with the Council or the inverse seems incomplete because they also imply merger of the Commission staff with the OEQC staff and redistribution of functions. Otherwise however, these alternatives reasonably represent the possibilities.

The distinction between the functions "Process EIS System" and "Administer total EIS system" is not clear, but both surely include what I have called "operation of the EIS system," a function that cannot effectively be exercised by a committee. For this reason, alternatives 2A, 2B, and 3B which would put the responsibility for "processing" or for "total administration" of the system in the Commission or Council would be unsatisfactory.

This leaves alternative 3A, which the Council seems to prefer, as the best of the alternatives identified. I have however, one reservation concerning 3A, and should point out that it is not exactly reflected in the proposed amendment of the EIS statute that was attached to the meeting announcement.

The reservation is simply that the alternative fails to recognize the present OEQC functions of technical review of EIS's and advising other agencies and the governor concerning EIS acceptability. These functions should be continued by the office, and the office should continue to have a technical staff capable of performing them.

Distribution of EIS-system management functions

Alternative 3A would place the responsibility for hearing appeals on EIS determinations in the Council and all other EIS-system management functions in the OEQC. The proposed amended statute would place in the Council, not only the appeal function, but the rule-making and exemption functions.

As indicated earlier, it will be effective to place in the OEQC (as an agency) all of the EIS-system operational functions. It would be inappropriate to place the appeal function in the OEQC because the OEQC will in many cases have already considered and advised on the EIS-determination decisions that may be appealed. The appeal function will, therefore, be appropriately placed in a committee like the Council providing the committee has access to the technical competence of an environmental agency like the OEQC.

As indicated earlier, it would be appropriate to place either the rule-making, the exemption function, or both, in the committee, providing it is advised by the agency, or in the agency, providing it is advised by the committee. It should be recognized that although placement of these functions in the Council would convert it to a regulatory body, its regulatory powers would be restricted to the method of operation of the EIS system, and would not include either the actual operation of the system or the regulation of actions covered by the system.

Composition of Council (or Commission)

Although Alternative 3A is identified as a merger of the Commission with the Council as distinct from the inverse merger, a mutual merger would be provided under the proposed statutory amendment. The committee to be retained would retain the name of the Council.
However, the present memberships of both Council and Committee would be terminated and the new Council would be appointed including at least ten members from the present Council and Commission. Something like this last proposed provision is extremely desirable to assure continuity.

The present requirements for the composition of the Council and Commission differ somewhat, the requirements in the case of the Commission apparently being intended to provide it with some internal technical competence. This will no longer be necessary if the new Council is provided with the technical advice of the OEQC.

Retention of the present size of the Council is proposed (14 appointed members plus, ex officio, the OEQC Director). However, it is proposed that the terms of the members be specifically 4 years, and that they be appointed so that, in the successive years of the 4 year cycle, there would be replacement (or reappointment) of 0, 4, 5, and 5 members. It would seem desirable that the total appointed membership of the Council should be an integer multiple of 4 (12 or 16), and that an equal number of terms (3 or 4) should end each year. An alternative would be 3-year terms with 4 or 5 terminations each year and a total membership of 12 or 15 respectively.

**EIS determination appeals**

In addition to the transfer of EIS-system management from the Commission to the combination of the OEQC and the reconstituted Council, the draft bill attached to the meeting notice calls for adding, to the present provision for appeals on EIS non-acceptance decisions (page 16, lines 14-15), a provision for appeals of what are commonly called "negative declarations" (page 17, lines 8-10). The reason for the inclusion of this new appeal provision is that this was a part of SB 21-67-82 which was used as the base for the proposed statutory amendment inclusion.

I consider the additional kind of appeal desirable. However, it seems to me that the inclusion of provisions to change the EIS system in other respects in the same bill as that intended to change the distribution of functions among the OEQC, Council, and Commission (including EIS-system management functions) may jeopardize the passage of the function-distribution provisions. I suggest, therefore, that the proposed provision for an additional kind of appeal should be deleted from the bill.

**Final note**

The Environmental Center will, of course, be pleased to respond to any inquiry from the Council or OEQC concerning the matters of concern at your meeting as well as any others of an environmental nature.