



10 Things to Look for in an EIR

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REVIEWING AN EIR (Ten Steps for Success)

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REVIEWING AN EIR

Introduction

The California Environmental Quality Act (CEQA) requires cities and other lead agencies to prepare an environmental impact report (EIR) for proposed projects which may have a significant impact on the environment. An EIR is intended to identify the potential adverse effects of a proposed project and to recommend mitigation measures and alternatives which can avoid or reduce those impacts. Because many development projects are controversial, EIRs often are subject to legal challenges. As a result, city attorneys are regularly asked to review EIRs for compliance with CEQA's requirements before the documents are presented to the city council for certification.

This paper provides practical advice for city attorneys who are tasked with reviewing the adequacy and completeness of EIRs. Although this paper refers to EIRs, the "Ten Steps for Success" discussed below are equally applicable to other CEQA documents, including initial studies, negative declarations and addendums. The recommendations in this paper are based on CEQA's statutory provisions (Public Resources Code § 21000, et seq.), the CEQA Guidelines (California Code of Regulations, title 14, § 15000, et seq.) and the author's 25 years of experience in advising cities and other public agencies on their duty to comply with CEQA.

Ten Steps for Success

1. Support Assumptions and Conclusions with Substantial Evidence
2. Verify All Numbers
3. Address the Question Asked
4. Analyze the Extent of Potential Significant Impacts
5. Address Post-2030 GHG Emissions
6. Make Mitigation Measures Effective and Enforceable
7. Use the Active Voice
8. Don't Defer Mitigation
9. Require Evidence of Infeasibility
10. Embrace Public Comments

STEP 1: Support Assumptions and Conclusions with Substantial Evidence

“Substantial evidence” includes facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts. It does not include argument, speculation or unsubstantiated opinion or narrative. (CEQA Guidelines § 15384.)

For example, a determination that mitigation would “substantially” reduce significant impacts, which is not supported by facts or other evidence, is insufficient. (*Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502.)

- Do ask “why” or “who says so” with respect to all assumptions and conclusions
- Don’t accept assumptions and conclusions at face value

STEP 2: Verify All Numbers

Inconsistent or incorrect numbers in the text or appendices of an EIR may result in an unstable project description or the understatement of potential impacts. (See, e.g., *Ione Valley Land, Air and Water, etc. v. County of Amador* (2019) __ Cal.App.5th __ [although appendix to DEIR contained accurate data, that data was not reflected in the text of the DEIR]; *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645 [inconsistencies in proposed aggregate mining project’s estimated annual production caused project description to be inadequate and misleading].)

- Do check all numbers throughout the EIR
- Don’t ignore the tables, figures or appendices

STEP 3: Address the Question Asked

EIRs often fail to address the specific question asked. This primarily occurs in two areas: (1) in an EIR's analysis of the "thresholds of significance" which are used to determine whether an impact is significant or less than significant; and (2) in the responses to public comments on the adequacy of a Draft EIR.

Thresholds of Significance (CEQA Guidelines § 15064.7)

- Do address the questions asked
- Don't combine separate questions

Responses to Public Comments (CEQA Guidelines § 15088)

- Do restate the comment's point or question in the response
- Don't ignore any points or questions raised in a comment

STEP 4: Analyze the Extent of Significant Impacts

An EIR's designation of a particular adverse environmental effect as "significant" does not excuse the EIR's failure to reasonably describe the magnitude of the impact. (*Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502 [EIR deemed insufficient because it identified significant air quality impacts but failed to discuss the extent of such impacts].)

- Do discuss the magnitude or extent of significant impacts
- Don't skip from the nature of an impact to the necessary mitigation

Example:

Would the project be located on a geologic unit or soil that is unstable, or that would become unstable as a result of the project, and potentially result in on- or off-site landslide, lateral spreading, subsidence, liquefaction or collapse?

No soil or geologic conditions were encountered during the geotechnical investigation that would preclude the development of the property as presently planned, provided the recommendations of the geotechnical report and requirements under the California Building Code are followed. Therefore, impacts would be less than significant.

STEP 5: Address Post-2030 GHG Emissions

A lead agency must consider a project's greenhouse gas (GHG) emissions in light of the statewide reduction targets for 2030 and 2050. In considering the effect of a proposed project on these long-term targets, an EIR's analysis stays in step with evolving scientific knowledge and the state's regulatory scheme. (*Cleveland National Forest Foundation v. SANDAG* (2017) 3 Cal.5th 497.)

Environmental analysis is expected to improve as more and better data becomes available. This expectation applies to all aspects of an EIR, including:

- Impact Analysis
- Mitigation Measures
- Alternatives

(See, e.g., *Cleveland National Forest Foundation v. SANDAG* (2017) 17 Cal.App.5th 413.)

STEP 6: Make Mitigation Measures Effective and Enforceable

CEQA requires an EIR to identify mitigation measures which are both effective and enforceable. “Effective” means the measures can reasonably be expected to avoid or reduce a potential significant impact. (CEQA Guidelines § 15126.4(a)(1)(A).) “Enforceable” means the measures are stated as conditions of approval in a permit, agreement or other legally binding document or incorporated into a plan, policy, regulation or project design. (CEQA Guidelines § 15126.4(a)(2).)

Do identify the four “W’s” in every mitigation measure:

- Who
- What
- When
- Where

STEP 7: Use the Active Voice

In *Sierra Club v. County of Fresno* (2014) 226 Cal.App.4th 704, the Fifth District Court of Appeal held that mitigation measures written in the passive voice are unenforceable because they fail to identify the person responsible for performing the mitigation. The Supreme Court declined to accept this view, holding that one could reasonably infer from the surrounding circumstances the identity of the person responsible for carrying out a measure. (*Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502.)

Nonetheless, use of the active voice should be encouraged because it increases the clarity of environmental documents.

- Do use the active voice

(“The project applicant shall implement the following noise reduction measures during construction”)

- Don’t use the passive voice

(“The following noise reduction measures shall be implemented during construction”)

STEP 8: Don’t Defer Mitigation

Don’t put off for future study or determination what can be done now. If practical considerations preclude devising mitigation measures at the time of project approval:

- Do commit the agency to devising the measures in the future
- Do identify specific performance standards which the measures must achieve
- Do identify the types of potential actions that can feasibly achieve the performance standards

(CEQA Guidelines § 15126.4(a)(1)(B).) Brand names may be an appropriate substitute for performance standards. (*Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502 [EIR’s specification of “PremAir or similar catalyst system” deemed a sufficient performance standard for HVAC systems].)

STEP 9: Require Evidence of Infeasibility

Like conclusions regarding significant impacts, findings of infeasibility must be supported by substantial evidence. (CEQA Guidelines § 15091(b).) The unsubstantiated opinions of project applicants do not constitute substantial evidence. (*Citizens of Goleta Valley v. Board of Supervisors of Santa Barbara County* (1988) 197 Cal.App.3d 1167.)

For development projects, economic infeasibility means the cost of a mitigation measure or alternative is so great that a reasonably prudent person would not proceed with the project. (*SPRAWLDEF v. San Francisco Bay Conservation & Development Com.* (2014) 226 Cal.App.4th 905.)

- Do require comparative cost, profit and economic data
- Do perform independent analysis of the evidence provided
- Don't accept unsupported assertions that mitigation measures or alternatives are too expensive

STEP 10: Embrace Public Comments

Every public comment which raises a “significant environmental issue” is entitled to a meaningful response, including detailed explanations of why specific comments and suggestions are not accepted. Conclusory statements, unsupported by factual information, are not sufficient. (CEQA Guidelines §§ 15088, 15204.)

Use public comments to your advantage. The exhaustion doctrine requires objections to be sufficiently specific so that the agency has the opportunity to evaluate and respond to them. (*Sierra Club v. County of Orange* (2008) 163 Cal.App.4th 523 [must present “exact issue”].) Responses to comments are the last, best chance to prevent a successful legal challenge.

Responses to comments also present another opportunity for a lead agency to tell its story. Although written responses are not required for late comments, it is prudent to provide written responses to all comments regardless of when they are received. (CEQA Guidelines § 15207.)

When responding to comments:

- Do remember who your audience is
- Do repeat the comment in the response
- Don't use "Comment Noted"
- Don't be snarky or defensive

Example:

Comment: The proposed reverse-angle parking will be shunned by most drivers.

Response: Commenter has offered no evidence whatsoever to support this assertion. Section 2.4.6 of the EIR states unequivocally that reverse-angle parking would improve sight-lines for approaching bicyclists and motorists, which completely refutes commenter's interpretation.