ROUND UP THE USUAL SUSPECTS: 34 COMMON DEFICIENCIES IN US AND CALIFORNIA EIAS

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INTRODUCTION

EIA's prepared under the US National Environmental Policy Act[1] (NEPA) and the California Environmental Quality Act[2] (CEQA), have tended to follow a gradually evolving standardized "cookbook" approach. Concurrent with the development of this "cookbook" approach to preparing EIAs, a "cookbook" approach to reviewing and challenging these EIAs has developed, where the reviewer searches for specific deficiencies that may be used to convince a judge that the EIA is defective enough that it must be rejected, rewritten, and recirculated for public review. Lawyers and practitioners involved in the review of EIAs refer to this colloquially as "rounding up the usual suspects". This paper briefly lays out the most common "usual suspects". These are deficiencies in disclosure, analysis, and process that have been determined by the legislatures and courts to substantively obstruct the honest disclosure of environmental setting, impacts, mitigation, or alternatives, or otherwise fail to achieve EIAs twin goals of environmental protection and public disclosure[3].

Project Description

The Project Description defines the scope and extent of any impact assessment because environmental impacts are entirely dependent on the parameters of the project. Said another way, it is impossible to prepare an accurate and adequate EIA if the project is not fully or correctly described, or is unstable and changes from chapter to chapter. Three types of deficiencies are commonly encountered in EIA Project Descriptions:

An EIA must evaluate the whole of the project. In fact, the CEQA Guidelines define a project as "The *whole of an action*, which has a potential for resulting in either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment…" (CEQA Guidelines Section 15378); emphasis added. Yet EIAs often contain **Incomplete Project Descriptions** that omit project details critical to identifying environmental impacts. For example, a recent EIA on a hillside residential development in California omitted any description of grading necessary to build the project. This occurred despite the obvious fact that knowledge of the extent of this grading was essential to identifying the projects impact on biological resources, visual quality, slope stability, erosion, and water quality.

Some EIAs also use a strategy of **Piecemealed or Segmented Project Descriptions** where only certain portions or segments of a proposed project are reviewed in the EIA.

An example of this is a highway project EIA that analyzes only one segment of a multi-segment roadway. This segmentation of a project is sometimes done to minimize the apparent impacts by splitting them amongst several different environmental documents. It also allows agencies to incrementally approve a large project while never actually evaluating the impacts of the whole of the project.

Equally problematic are **Inconsistent, or Unstable Project Descriptions**. Frequently a project is changed after the writing of the EIA project description, and these changes may be substantial. For example, the footprint of a sanitary landfill project was altered during preparation of an EIA, yet the EIA authors either were not informed of the change or failed to include it in the document. The end result was that applications for air and water pollution discharge permits were for a project never actually evaluated in the EIA, despite the requirement that the EIA for the local project authorization also serve as the EIA for the air and water pollution permits. Other times an EIA will describe a project differently in different technical chapters. For example, in the landfill EIA mentioned previously, the landfill footprint varied by up to 20% from one chapter to another. It is impossible to accurately evaluate a project when its description is not static, consistent, complete, or accurate. For this reason, California courts have regularly ruled as inadequate EIAs that grossly understate or misstate project elements relevant to environmental impacts.

Setting

The environmental setting forms the baseline against which post-project conditions are evaluated. As such, an inaccurate setting can severely skew the impact assessment. In defining the project setting one must first estimate the spatial and temporal extent of the project impacts. As such, defining the setting often is an iterative process with impact assessment. Sometimes a setting fails to appropriately reflect the resources to be affected by a project. Three "usual suspects" can be found lurking in the setting corral:

All relevant aspects of the setting must be described in order for impacts to those resources to be adequately assessed in an EIA. Sometimes a setting section will inadvertently or intentionally omit a critical resource, resulting in an **Incomplete Setting Description**, which, in turn, will fail to be evaluated in the impacts section. For example, an EIA on a shopping center failed to use a current biological survey and instead relied on one several years old, thereby missing the subsequent discovery of a rare plant on the site. The failure of the setting to identify and describe the important resource ultimately led to the failure of the impacts analysis to identify its loss as a significant impact.

Use of **Erroneous Baselines** also can skew the impacts assessment. Two types of erroneous baselines are common to EIAs – erroneous spatial baselines and erroneous temporal baselines. Erroneous spatial baselines are fairly straightforward – they typically occur when an EIA setting section fails to describe and consider a broad enough area to cover all potential project impacts. Sometimes, the reverse occurs, leading to an impact evaluation where project effects are diluted by the too-large baseline. Temporal baselines are trickier – frequently an EIA preparer is bedeviled by

the question of whether an EIA impacts analysis should be compared to currently existing on the ground conditions or to some future conditions projected to occur at the time of project construction or completion. This issue is further confused by conflicting state and federal regulations regarding this issue – California law strictly mandates that in nearly all cases a setting is the on-the-ground conditions at the start of the EIA process.[4] Yet NEPA allows consideration of a future baseline as the setting condition. This conflict results in schizophrenic EIAs, particularly when they are attempting to address both State and Federal EIA preparation requirements.

A favorite approach for those not wishing to disclose the full extent of the impacts of a project is to compare that project not to existing conditions but rather to planned full buildout of an area. This use of **Plan Buildout Rather than Existing Conditions** invariably overstated existing disturbance to the resources, thereby reducing the apparent effects of the project. For example, an EIA for a new land use plan for 200,000 acres in the backcountry of rural San Diego County used as the baseline full development under the existing land use plan, even though 90% of that development had not occurred. Because the new plan had less development density than the existing plan, the environmental effects of the new plan were determined to be positive, even though actual on-the-ground development would increase 500% from existing conditions. As noted above, California law forbids this approach, making it a favorite "usual suspect" for those critiquing an EIA. In the example cited above, the courts ruled the EIA inadequate because it failed to adequately describe existing conditions.

Impacts

The impacts analysis is the heart of the EIA process, however correctly identifying impacts can be tricky, and there are a number of common errors or intentional manipulations of the impact assessment process. First among these is **Incomplete Impacts Analysis**. This typically takes the form of a partial analysis, calling out some but not all impacts. It is often associated with an incomplete project description and/or incomplete setting description, discussed above. This sort of incomplete impact analysis generally understates project impacts. An example is a hydrologic analysis that fails to consider all of the project's pollutant sources.

Another common impact deficiency, closely related to incomplete impact analysis, is the **Omitted Impacts Analysis**. In this scenario, entire impact topics are just omitted from the EIA. Surprisingly, this is not an uncommon occurrence, and is generally associated with a defective setting section. If sensitive resources are not identified on the site in the setting section, then the effects of the project on those resources are typically subsequently omitted from the impacts discussion. Omitted impacts analyses can be a fatal flaw, rendering an EIA legally deficient.

Even more common is the **Inaccurate Impacts Analysis**. Whether intentionally or inadvertently, contain substantive inaccuracies. The causes of these inaccuracies can range from the use of the wrong models in calculating impacts, to errors in calculations, to data gaps, to the authors running out of time or budget and just "faking it", to intentional tweaking of impacts analyses by project proponents or agencies. This latter

type of deficiency is present in a large number of EIAs, and is often related to the tight timelines and budgets under which the analyses are prepared, as well as the lack of training of staff at some consultancies. Often these inaccurate analyses jump out as counter-intuitive or obvious gaps; other times only an expert can determine problems with accuracy. As an example, I recently engaged an air quality expert to conduct a peer review of a counter-intuitive air impacts assessment. The expert ultimately determined that the assessment used not only an outdated model but also used erroneous assumptions and inputs in the model intended to minimize the appearance of project impacts.

Two closely related subspecies of Inaccurate Impact Analyses are **Skewed or Biased Impacts Analyses** and **Conclusatory Analyses.** Skewed impact analyses tell only part of the story or, as mentioned previously**,** use models, methods, assumptions, or inputs designed to intentionally understate or overstate impacts. Skewed analyses also may report only one side of an issue. For example, they may report only one side of competing expert opinions or just one of possible multiple interpretations of data or analyses. Conclusatory analyses are essentially unsupported conclusions posing as analyses. They typically rely on the presumption of the assessor as an expert, therefore negating the need for supporting documentation.

Sometimes EIAs are faced with extensive or expensive impact assessments that, for reasons of schedule, budget, or technical difficulty, they just don't want to do. In this case, they may elect to punt, resulting in the **Deferred Impacts Analysis** deficiency. One approach to deferring impact analyses is to make the analyses a condition of future project approval. Another approach is to defer the analyses from a program level document to some future project level analysis. Probably the most common approach is to require the study as a mitigation of the project. Sometimes this approach is valid, other times not. The key determinant is "is the analysis possible to do now, and, if so, is the analysis necessary to understand (and disclose) the full extent of the project's impacts?"

Another common deficiency in EIA is to conduct a thorough and accurate impact assessment and then either downplay or overstate the significance of the impacts by using **Skewed or Biased Criteria of Significance.** One of the requirements of EIA under California and US laws is the identification of the significance of an impact. Under California law, a series of Findings must be made by the lead agency prior to approving any project that may have significant adverse impacts on the environment. Therefore, some agencies desire to understate the significance of certain project impacts. This can be done by devising a set of significance criteria under which project will just barely fall. For example, if a project will generate grading of 29,000 cubic yards of material, the significance criteria can be set at 30, 000 cubic yards. Because lead agencies have broad discretion over criteria of significance, this sort of gerrymandering is difficult to counter, unless it contradicts significance criteria previously adopted or used by the agency or by agencies with specific expertise over the resource in question.

Another corruption of the impact analysis can occur when **Impacts Conclusions Don't Match the Analysis.** Because of the importance of determining significance or non-

significance of project impacts, as described above, some EIAs will have straightforward analyses with tacked-on conclusions that don't match analyses. For example, a report may describe at length the severe biological consequences of an action, and then state flatly, and with no support in the analysis, that these impacts are not significant. Usually this is the result of last-minute editing by attorneys, agencies, or applicants.

Two other common deficiencies in impact assessments are **Impacts Analysis Omits or Fails to Adequately Address Short-Term Impacts** and **Impacts Analysis Omits or Fails to Adequately Address Long-Term Impacts (Including Sustainability Issues**). In the former case, the EIA downplays short-term impacts such as construction noise or dust as insignificant because of their limited duration, despite CEQA and NEPA guidelines to the contrary. In the latter case, the EIA fails to place the project's impacts in a long-term context, thereby obscuring or omitting the project's effects on long-term sustainability of the affected resources. Closely related to failure to address sustainability issues is the **Analysis Omits or Fails to Adequately Address Cumulative Impacts** deficiency. Here, the EIA either fails to correctly identify the universe of cumulative projects with impacts that may overlap those of the project, or fails to analyze those impacts in a meaningful way. Cumulative impact assessment is difficult to do well, and this deficiency is usually a result of lack of time and resources, and not an overt attempt to bypass legal requirements for these analyses. There are a large number of cases where EIAs have been rejected by the courts for failing to adequately assess these cumulative impacts.[5]

Mitigation

Mitigation measures are the primary EIA tools to reducing or eliminating project impacts. Here, as in setting and impact discussions, **Incomplete and Omitted Mitigation Measures** are common deficiencies. Closely related to incomplete mitigation measures are Unproven or Ineffective Mitigation. These are measures with no history or evidence of effectiveness. Perhaps the most common mitigation deficiencies are **Imprecisely Worded or Vague Mitigation Measures** and **Mitigation Measures Worded with Lack of Commitment.** Common examples of these types of deficiencies are mitigations "encouraging" or "considering" or "studying" certain actions, and measures recommending further study of an impact or development of some sort of future plan as mitigation. None of these measures actually mitigates anything, and they should therefore be considered "straw men" mitigation.

Sometimes EIAs identify **Unenforceable Mitigation Measures.** These are either measures that the lead agency has no power to enforce upon the project proponents, or measures that are just plain infeasible. In either case, ultimately, they do not mitigate the impacts. A close cousin of unenforceable mitigation measures is **Non-Monitorable Mitigation.** This type of mitigation is so vaguely written or so generic as to preclude any meaningful monitoring of its implementation and/or effectiveness.

Alternatives

Alternatives provide the public with a comparison of potential land uses on a site or area, and serve to mitigate large-scale effects of a project. EIAs sometimes include alternatives that have greater overall environmental effects than the proposed action; these "**Straw Man**" **Alternatives** deceive the public by diminishing the relative effects of the project; furthermore, these types of alternatives fail to achieve the primary purpose of alternatives: to reduce or eliminate project impacts on the environment. Other **Alternatives that Fail to Mitigate Impacts** also are impermissible and inappropriate. Under both NEPA and CEQA an EIA must include a range of reasonable alternatives, and cannot narrow that range to omit reasonable feasible alternatives to a project. Additionally, under CEQA, the EIA must identify an environmentally superior alternative other than the No Project Alternative. Strong precedence exists under both California and US case law to decertify EIAs that have an **Inadequate Range of Alternatives[6].**

Occasionally, an EIA will include an alternative that addresses only a portion of the project or site. Such **Partial Alternatives** may or may not be appropriate, depending on the percentage of project impacts actually addressed by the alternative. I recently reviewed an EIA on a landfill that had an alternative that included only a relocated water line; all else was identical to the project. Such changes may constitute mitigation but are not a valid alternative.

There are two possible forms of No Action Alternatives: one with no alteration of the existing conditions compared to the baseline, and another where the existing designated land uses of a site are fully built out. Typically the former is described in the baseline or

existing conditions sections of the EIA, and the latter forms the No Action Alternative. Some EIAs include both possibilities as No Action Alternatives. Some EIAs include **Inappropriate No-Action Alternatives,** which do not address either of the above scenarios.

Process

The US in general and California in particular are highly litigious places and litigation over EIAs is common. In these venues, judges prefer to avoid second guessing a lead agency's conclusions regarding technical issues (unless there are severe errors or omissions) but do not shy away from decertifying EIAs if the formal process described in laws, regulations, and guidelines are not properly followed, especially if these procedural errors serve to reduce or deny the public's ability to participate in the EIA process. Common errors in the EIA process that result in courts overturning an agency's decision regarding an EIA (and the project for which it was prepared) include **Inadequate Public Noticing, Inadequate Public Review Period, Inadequate Responses to Public Comments and Questions,** and **Substantial New Information Added Without any Opportunity for Public Review.**

General

Finally, several other, more general, "usual suspects" occur. These include **EIA "Data Dumps**", which contain voluminous amounts of data but minimal or no analyses or conclusions. Such documents are commonplace on complex projects, where technical experts fear making a subjective conclusion regarding the significance of the impacts. Similarly, report sections may be comprised of **Technical Jargon Incomprehensible to Public,** which also fails to result in a document accessible to the public, thereby obstructing the public's important role in these EIA processes.

Another common general deficiency in EIAs is the problem of **Internal Inconsistencies.** Typically the result of repeated review and subsequent careless editing, these pop up in a great number of EIAs. The severity of this deficiency depends upon the importance of the inconsistency. If it substantively affects the public's ability to comprehend the full extent of the project impacts, it could result in the EIA being deemed inadequate.

CONCLUSIONS

The corral full of "Usual Suspects" described in this paper may lead some observers to despair that it is nearly impossible to create a bullet-proof EIA under US and California law. This is not the case. The public and the courts do not demand perfection, but do demand and deserve "a good faith effort" at objectively gathering, analyzing and presenting information in these documents, and at following the required procedures. It is only when the public are denied the opportunity for meaningful participation in the process that the usual suspects are deemed criminal. In most cases they are usually released on the lead agency's recognizance.

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[1] NEPA is codified as 42 U.S.C. 4321; 40 C.F.R. 1500.1. Additional guidance has been promulgated by the President's Council on Environmental Quality and implementing federal agencies.

[2] CEQA is codified as California Public Resources Code 9PRC) sections 21000 et seq. Detailed CEQA Guidelines have been adopted by the State as Public Resources Code sections 15000 et. seq. Local agencies also may develop guidelines consistent with the State statute and Guidelines.

[3] CEQA legislative intent is described in PRC sections 21000, 21001, 21002 and 21003. Of particular interest is section 21002, which states:

> The legislature finds and declares that it is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects, and that the procedures required by this division are intended to assist public agencies in systematically identifying both the significant effects of proposed projects and feasible alternatives or feasible mitigation measures which will avoid or substantially lessen such significant effects. The legislature further finds and declares that in the event specific economic, social, or other conditions make infeasible such project alternatives or such mitigation measures, individual projects may be approved in spite of one or more significant effects thereof.

[4] CEQA Guidelines Section 15125 states:

> An EIR [the CEQA parlance for EIA] must include a description of the physical environmental conditions in the vicinity of the project as they exist at the time the notice of preparation [of an EIR] is published, or if no notice of preparation is published, at the time environmental analysis is commenced, from both a local and regional perspective. This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant.

[5] CEQA case law is well summarized in a number of texts; this author typically refers to Remy, Michael H, Tina Thomas, James Moose, and Whitman Manley, Guide to the California Environmental Quality Act, 1999 (Tenth) Edition. Solano Press Books, 1999.

[6] Ibid