

WHAT EVERYONE SHOULD KNOW ABOUT THE ENVIRONMENTAL REVIEW PROCESS: BASIC TIPS FOR BETTER ENGAGEMENT

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THIS SKILL BUILDING WORKSHOP WILL FOCUS ON EDUCATING COMMUNITY MEMBERS ON HOW TO BETTER ENGAGE IN THE LEGAL PROCESS THAT REVIEWS PROJECTS FOR THEIR ENVIRONMENTAL IMPACTS (CEQA, NEPA). THIS IS WILL BE A 101-TYPE COURSE FOR NON-LAWYERS WHO ARE NEW TO THIS PROCESS. THE COURSE WILL PROVIDE TIPS ON HOW TO ENSURE THAT YOU HAVE PROPER NOTICE OF PROJECT MEETINGS, EXPLAIN SOME OF THE LEGAL JARGON USED IN THE ENVIRONMENTAL REVIEW PROCESS, AND OUTLINE HOW TO DOCUMENT YOUR CONCERNS. THE SESSION WILL BE CONDUCTED IN LECTURE FORMAT AND CONCLUDE WITH AN INTERACTIVE SESSION WITH A MOCK GOODS MOVEMENT PROJECT SCENARIO WITH THE AUDIENCE APPLYING THE CONCEPTS THEY'VE LEARNED.

National Environmental Policy Act (NEPA)/California Environmental Quality Act (CEQA)

WHY SHOULD I CARE?

1. Purpose and Relevance
 - Many goods movement projects are subject to NEPA and related state laws. These laws require government agencies to study the environmental and public health impacts of goods movement projects, and provide information about the project to the public through a public process.
 - The purpose of these environmental laws is to promote informed decision-making—that the environmental consequences of a project are known before the project is approved.
2. Opportunity to learn about the project, convey concerns, propose mitigation, propose alternatives.
3. Can slow the process and enable you to obtain a substantive remedy through a different route (political process).
4. Need to participate if you want to sue.

HOW TO BE IN THE LOOP

1. Find out “who” is in charge (the “lead agency”). Lead Agency = the agency responsible for the environmental document/agency that will approve the project.
2. “What” environmental analysis has been/will be performed (EA, FONSI, EIS, EIR, Mitigated Negative Declaration)?
3. “When” environmental studies will be complete, when comments are due, when public hearings will occur, when decision will be made, when construction is to commence?
4. Get notice. Put yourself on email lists, mailing lists re the project.

UNDERSTANDING THE CEQA/NEPA PROCESS AND THE LEGAL BUZZ WORDS

1. What triggers environmental review under NEPA/CEQA?
 - a. NEPA (federal statute): Major Federal actions significantly affecting the quality of the human environment.
 - b. CEQA (CA statute modeled after NEPA): required for "projects." A project is a discretionary action taken by a public agency that has the potential to result in a change in the environment.
 - c. Examples: Permits, leases, licenses, funding allocations for goods movement projects.
2. What environmental impacts are to be assessed? All direct and indirect effects –e.g., impacts to aesthetics, air quality, land use, noise, traffic, water quality, endangered species, public safety/public services, among others.
3. "Baseline": tool for measuring the impact of the project.
 - a. NEPA: The "baseline" constitutes what one would expect to happen to the project site over time absent the project (what will this site look like 10 years from now?).
 - b. CEQA: The "baseline" is what project impacts are measured against to determine significance. It is the environmental conditions that existed at the time the CEQA process was initiated. It is a snapshot in time of the environmental conditions assuming no project growth. It is different from the NEPA baseline that incorporates what is likely to happen to the site over time.
4. What is a "Significant" Impact?
 - a. NEPA: Significance is determined by looking at both the "context" of the action and its "intensity."
 - i. "Context" means that the significance of an action must be analyzed from several perspectives, such as the affected region, the affected interests, and the locality.
 - ii. "Intensity" refers to the severity of the impact. In assessing "intensity," agencies are to consider ten factors (presence of any one of the ten factors may trigger the duty to prepare an EIS) including:
 - Degree to which the proposed action affects public health;
 - Unique characteristics of the geographic area such as proximity to park lands, wetlands, or prime farmlands;
 - Degree to which the effects on the quality of the human environment are likely to be highly controversial;
 - Degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks;

- Whether the action is related to other actions with cumulatively significant impacts; and whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

- CEQA: "significant effect on the environment" means a substantial or potentially substantial adverse change on the environment. To determine if a project impact is significant, you compare baseline conditions with project conditions and compare the difference to a qualitative or quantitative threshold (e.g., x tons of pollutant = significant impact).

5. Types of Environmental Documents

- EIS/EIR = Environmental Impact Statement/Environmental Impact Report. An in-depth environmental analysis with many opportunities for public input. An EIS/EIR = document that informs decision-makers and the public of: (a) significant environmental effects of a project, (b) possible ways to minimize significant effects, and (c) reasonable alternatives.
 - EIS/EIR must be prepared if there *may* be significant impacts on the environment; significance determination need not be absolute.
 - Failure to prepare an EIS/EIR can be a basis for a lawsuit.
- Environmental Assessment (EA)/Initial Study: brief study to determine if an EIS/EIR is necessary.
- Finding of No Significant Impact (FONSI)/Negative Declaration: document that describes why a project will not have a significant effect on the environment and why the project does not require an EIS/EIR. Must be supported by an EA/Initial Study.
- Mitigated FONSI/Mitigated Negative Declaration: An EA/Initial study that indicates potentially significant impacts but outlines mitigation that will be adopted to avoid the significant impact from occurring. If a Mitigated FONSI or Mitigated Neg Dec is prepared, and EIS/EIR is not required.
- Exemptions/Categorical Exclusions

6. Duty to Mitigate

- NEPA: no duty to mitigate significant impacts.
- CEQA: duty to mitigate significant impacts by adopting all "feasible" mitigation.

7. Alternatives: NEPA and CEQA require consideration of a reasonable range of alternatives. NEPA treatment of alternatives is more demanding (NEPA requires each alternative and proposed action to be equally evaluated and compared).

8. Limitations/realities of NEPA/CEQA

- Provides procedural *not* substantive remedy.

- Few if any projects don't go forward. Can feel both empowering and disempowering.
- Litigation/settlement w/mitigation often the end goal.

TIPS FOR ENGAGING IN THE ADMINISTRATIVE PROCESS

1. Participate! What it means to "exhaust."

You need to participate if you want to preserve your right to sue. Participation means drafting a timely comment letter, providing oral testimony, and outlining the nature of your concerns w/some specificity.

2. Gather and identify your "friends."

- Coalition building
- Comment letters from agencies/universities/"objective" parties very helpful
- Press
- City Council, congressional members
- If they won't listen to you, who will they listen to?

3. Draft comments and figure out what to put in the record.

- Comments/documents that illustrate impacts
- Comments/documents that illustrate flaws
- Comments from "objective" 3rd parties
- Methodologies/protocol for studying impacts adopted by reputable agencies (e.g., HRA protocol adopted by CARB, models used for estimating GHG emissions utilized by EPA)
- Evidence of contradictory approaches taken by lead agencies/project applicants
- Mitigation measures (what others are doing, what project applicant is doing elsewhere)
- Alternatives

*Shoot for diversity in comments; both quality and quantity are important!

*Meet deadlines!

*The "record" constitutes the universe of evidence you can rely upon if you sue.

4. What to look for when reviewing environmental documents

a. *Nature of Project*

- Length/intensity of construction
- What vehicles/equipment will be used? What vehicles will be attracted to the site? (trucks, ships, trains, cargo handling equipment) How many?
- What will the project look like at its opening and at full capacity? (number of lifts, ship calls, truck trips, TEUs)
- How does the project at full build out compare with current conditions/future conditions without the project?
- Will operations occur 24/7?

b. *Project Setting*

- How many people live in close vicinity to the project site or project operations? How close? (Note that communities that don't live at the fence line may be greatly affected, e.g., neighborhoods along truck routes where cargo from port/rail yard may travel.)
- Where are the "sensitive receptors"? (schools, hospitals, day care facilities, nursing homes)
- Are there nearby streams, lakes, sources of food and drinking water?
- Are current environmental conditions in the area degraded? (e.g., area fails to meet federal air quality standards?)

c. *Potential Impacts*

- Air pollution and associated health impacts (e.g., cancer/non cancer risk) created by the project
- Water pollution -threats to drinking water, recreational use of waters, threats to aquatic species; food sources
- Noise and vibration
- Aesthetics
- Traffic
- Land use
- Growth inducement (what will accompany the project? Distribution centers, container storage yards?)
- Endangered species
- Public safety/public services
- Hazards

d. *Possible Flaws*

- Failure to perform EIS/EIR; failure to find possibility of significant impacts
- Inconsistencies between chapters in environmental documents (e.g., AQ section predicts emissions from 10,000 trucks per day, but traffic section reports 20,000 trucks per day)
- Inconsistencies arising from contradictory statements made by project proponents re size/nature of project
- Drawing geographic scope of the analysis too narrowly (e.g., only considering "onsite" emissions, failing to "follow" the emissions)
- Mitigation measures are noncommittal, have loop holes
- Unrealistic assumptions
- Failure to analyze impacts because they are too "uncertain"
- Inflating baseline
- Failing to examine a reasonable range of alternatives
- Too much control by the project applicant over the environmental review document and its findings
- Failing to provide regional *and* local impact analysis

HYPOTHETICALS (20-30 MIN)

THE RAIL YARD PROJECT

ABC Railway Company has proposed a 300-acre intermodal rail yard in Clean City, Alabama. The project site is home to a large stream and several acres of wetlands. The stream runs into a nearby lake that is used as a source of drinking water for local residents. Clean City is in an air basin that is characterized as violating federal air quality standards. The closest residential subdivision to the rail yard is 1 mile away but the trucks that serve the rail yard will use a local highway where homes are less than 200 feet away. Clear City has been hit extremely hard by the recession and the local newspaper has written a series of articles about how the rail yard will bring hundreds of jobs to the area. In trying to sell the project to the public, ABC Railway Company held a number of community forums where it described the project as encompassing 500 acres. You ran a few internet searches and found that the state of California has required rail yards to reduce air pollution from their operations through the implementation of new technologies, and that universities in that state have conducted a lot of research on the effects of diesel pollution on public health.

THE PORT EXPANSION PROJECT

The Port of Evergreen has proposed a container terminal expansion project. Annually, the project will result in 400 additional ship calls and over 1 million trucks trips. Homes, schools, and day care centers are across the street from the proposed terminal, including the home of a prominent and vocal city council member. The lead agency has conducted an EA and issued a FONSI. The EA reports that the project is good for the environment because over time, the expansion will phase-in the use of newer, cleaner, less polluting equipment so that after 10 years of operation, air pollution from the project will be drastically reduced from their current levels. The local air district has reviewed the EA and concurs that the project will result in air quality benefits for the tri-county region at the end of 10 years. Earlier this year, a similar project was proposed and approved and an EIS/EIR was released.

Helpful websites

- <http://ceres.ca.gov/ceqa/more/faq.html>
- <http://www.epa.gov/compliance/basics/nepa.html>
- http://ceq.hss.doe.gov/nepa/Citizens_Guide_Dec07.pdf