

## Preparing an EIR for

# BATTLE

Four of the most common legal challenges and how to meet them



At some point during the skirmishes of Los Angeles property development war games, virtually every practitioner will encounter that soft-covered bound document spewing hundreds of pages of hypertechnical references to PM10 readings, V/C ratios, and 70 Ldn dB(A) noise contours, known to civilians as an Environmental Impact Report (EIR). Destined to fall directly into the hands of hostile forces in the council chambers and courtrooms of the state, the EIR is designed to be subjected to grueling inquisition by adversaries who will not be satisfied until they obtain its confession to real or imagined crimes. How well the document stands up under such pressure depends in large part upon the attorney responsible for its final inspection on the eve of battle. This article is intended to guide the reviewing attorney in identifying and strengthening some of the most common liabilities found in contemporary EIRs.

By their terms, the California Environmental Quality Act (CEQA)<sup>1</sup> and accompanying regulations (CEQA Guidelines)<sup>2</sup> require a local government agency to prepare an EIR for any proposed project within its jurisdiction likely to have an adverse effect on the environment. While the law contemplates that the public

agency will prepare and certify the EIR, the drafting of the document typically is conducted by an outside consultant selected and paid by the project developer.<sup>3</sup>

Once the draft EIR has been completed, the developer often will turn to the same lawyer who negotiated the purchase of the property, or helped apply for entitlements, to review the EIR as well. As a consequence, even though in many cases the EIR is sure to become the focus of a lawsuit later brought by project opponents, the attorney called upon to review an EIR is more often than not a transactional lawyer who has never defended, and will never

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have to defend, an EIR in court.

Generally working under tight deadlines, the reviewing attorney's instinctive response is likely to be one of deference to the judgment of the professional EIR consultant. Given the consultant's expertise (a typical consultant will prepare far more EIRs than a typical real estate lawyer will have the opportunity to review), this response is understandable.

Nevertheless, ultimately it is the singular duty of the lawyer, and not the consultant, to make sure the client is well protected before a court of law. The lawyer, who is trained in the subtleties of language and in the art of reasoned debate, is preeminently qualified to determine the sufficiency of the words used and issues addressed to convey the consultant's findings in a manner designed to minimize the potential for successful legal challenge.

In form, an EIR is nothing more than a public disclosure report. The EIR identifies the environmental consequences of a specific development proposal and specifies mitigation measures and alternatives to help alleviate adverse environmental impacts. Where mitigation measures are not feasible, the EIR process does not assure that decision makers will reject an environmentally threatening project. All that is required of an EIR is that it identify and adequately discuss the adverse environmental impacts.

In function, however, the EIR often becomes the primary vehicle by which project opponents seek to delay, and thereby ultimately defeat, a proposed development. Legal challenges to the sufficiency of an EIR may be turned into "a game to be played by persons who—for whatever reasons and with whatever depth of conviction—are chiefly interested in scuttling a particular project," as one court bluntly warned.<sup>4</sup> "Groups use lawsuits to stall projects—not to protect the environment," concluded the Peter Ueberroth-headed Council on California Competitiveness.<sup>5</sup>

An agency approving a project requiring an EIR will be required to adopt findings determining the environmental impacts caused by the project and the mitigation measures to address those impacts. In general, a court reviewing a challenge to an EIR-related approval will be guided by the "substantial evidence" standard; that is, the court will determine whether the findings of the agency are supported by substantial evidence in the record. In such cases, the foremost item in the record is the EIR itself. The EIR therefore nearly always serves as "Exhibit A" in demonstrating substantial evidence to a reviewing court.

As a result of the steady growth of EIR based litigation over the past two decades, the purpose of the EIR has strayed from enlightening citizens and government leaders to insulating a project from legal attack. At the same time, however, the body of law

arising from these CEQA-related challenges has markedly increased the level of sophistication to which EIRs are held today. Whether the proliferation of EIR lawsuits over the years is therefore seen as a negative or positive development, the attorney's primary function in reviewing an EIR has remained the same: to ensure that the EIR contains substantial evidence which accurately identifies, discusses and mitigates the significant adverse environmental impacts of a project.

A reviewing attorney must prepare an EIR to withstand a variety of challenges in diverse settings. The EIR will face the scrutiny not only of trial and appellate judges, but also of government decision makers, community groups, public interest organizations, individual gadflies and unions, each of which may have agendas friendly, antagonistic or indifferent to the underlying project. In fact, perhaps the most realistic threat facing a modern EIR is not that it will be declared wholly inadequate by a court of law, but that a local agency will require its "recirculation" because its treatment of one or two issues will be found deficient.

California law provides that if the draft EIR overlooks "significant" information, the EIR must be revised to include the information and then "recirculated" in its entirety as if it had never been issued.<sup>6</sup> Recirculation is an appealing remedy to nervous governmental bodies considering controversial projects, because it appears to effect a reasonable compromise and evidences a sincere attempt to address public objections. Constituents opposing the project are placated, the project proponent, although detained, is by no means denied, and the EIR's credibility is strengthened for later judicial review.

The recirculation process, however, may involve significant delay and unanticipated expense, either of which may in the extreme case jeopardize the project itself. The reviewing attorney should therefore take early steps to minimize the potential for not only successful legal challenge but also recirculation of the EIR.

#### COMMON LEGAL CHALLENGES

There are four commonly raised substantive challenges to an EIR, any of which, if proved, would seriously jeopardize the integrity of an EIR:

- 1) The EIR fails to discuss a particular impact at all.
- 2) Even if the EIR discusses a particular impact, the discussion is faulty and unduly minimizes the significance of the impact.
- 3) Even if the EIR discusses a particular impact and accurately quantifies its significance, the EIR fails to consider or adopt feasible mitigation measures for the impact.
- 4) Even if the EIR discusses a particular impact, accurately quantifies its signif-

icance and considers and adopts all feasible mitigation measures for the impact, the EIR still fails to consider a reasonable range of alternatives to the project.

The reviewing attorney therefore should consider each of these claims in this logical sequence.

Of course, the first step in reviewing any EIR is to consult CEQA and the Guidelines themselves.<sup>7</sup> CEQA Guidelines, a new version of which was released in the summer of 1992, are far more detailed and helpful than the statute itself for this purpose.

#### DEALING WITH THE CHALLENGES

1. The EIR fails to discuss a particular impact at all.

*Check out more than the checklist.* Identifying the range of potential impacts from a project involves far more than looking over a simple checklist. The "state of the art" for the range of potential impact to be considered in EIRs is constantly evolving. For example, just five years ago EIRs for urban projects routinely omitted any discussion of freeway impact. Today, such EIRs would likely be seen as deficient without such a discussion. Likewise, solid waste impact is rapidly becoming a standard feature in contemporary EIRs. In addition, the emphasis placed on various impacts will vary from time to time and area to area. Impact on water supply, for example, has required more detailed discussion in recent years than in the mid-1980s, and impact in drought-sensitive areas demands even more heightened analysis.

Moreover, each EIR arises in a completely unique context. A proposed office building in downtown Los Angeles will have far different impact on local flora and fauna, for example, than a proposal for a landfill in an undeveloped canyon.

Government planning officials do keep a kind of checklist of potential impact types, called an "Initial Study," which must be completed for each project early in the application process. The Initial Study identifies a list of impact categories which must be addressed in each EIR (a sample is provided at Appendix I of the CEQA Guidelines). Sample categories of impacts from an Initial Study include: earth, water, plant life, animal life, natural resources, risk of upset, population, housing, human health, cultural resources, land use and zoning, parking, transportation and circulation, air quality, public services and utilities (including police, fire, wastewater, water, gas and electricity), recreation, view, aesthetics, shade and shadow, light and glare, noise, and solid waste.

The reviewing attorney should obtain a copy of the Initial Study and make sure that the EIR has addressed each impact category of the Initial Study somewhere in its text. Also, the reviewing attorney should confirm that the discussion for each category analyzes both project-specific as well as cumulative impact, as required by CEQA.

Initial Study forms, however, do not

often keep up with the times. Newly evolving impact categories are not likely to be present on the list. Therefore, the reviewing attorney should try to find out what other recent EIRs for similar projects have identified as impact sections and whether any have been challenged for failing to include certain categories. Copies of pleadings in litigation involving other recent EIRs are most instructive. Speak with a representative of the government body processing the project and, if possible, obtain copies of one or two recent EIRs. Also, look over the transcripts or minutes of any public hearings on similar projects to find out if public commentators identified any missing categories.

*Scope out the scoping sessions.* To the extent there have been "scoping" sessions for the project, such as public hearings or conferences with public agencies where concerns about the project's potential impact are discussed, the reviewing attorney should obtain transcripts (or at least minutes) of those hearings. Records from these meetings often will highlight the impact categories of a project which are perceived by the persons most affected by it.

*Foresee the foreseeable.* The reviewing attorney should review the project description thoroughly. The reviewing attorney should consider what kinds of activities may be "reasonably foreseeable" as a result of the project. Impact from activities which are not just speculative but are reasonably likely to occur cannot be left to a later EIR to be examined.

Thus, where it is reasonably foreseeable that a landfill, for example, will begin generating and distributing energy from methane gas production, such energy facilities should be discussed. Where only a portion of a building is immediately proposed for certain uses, but the rest of the building is intended ultimately to involve the same uses as well, impact from the entire building uses must be evaluated. Where a water treatment center is the subject of an EIR, the construction of pipes or canals to the center is reasonably foreseeable. Any easements necessary for proper operation of a project are also reasonably foreseeable and should be discussed.

*Brief even the briefest impact.* Not every impact that must be discussed will be permanent. Check the EIR for a discussion of temporary impact, including impact from construction. Impact from construction includes closing off streets and detour routes, dust and noise generation and traffic impact from construction vehicles. Each such impact can be addressed in a separate section of the EIR or discussed under each category of impact discussion.

**2. Even if the EIR discusses a particular impact, the discussion is faulty and unduly minimizes the significance of the impact.**

*Never understate impact.* As a gen-

eral proposition, an EIR which overestimates impact is more likely to survive challenge than one that underestimates impact. In part, this rule has evolved in reaction to the historical tendency of certain EIR preparers to minimize environmental impact, leading to incredulous findings that facilities such as hazardous waste incinerators would result in no significant potential adverse impact whatsoever to their communities. As a result of such past practices, contemporary EIRs that identify significant impact, even if not likely to occur, generally are more credible than EIRs that conclude, however legitimately, that no impact will occur.

One effective strategy to consider is to include a discussion of impact that would occur under a "worst-case scenario." An EIR that analyzes the worst-case impact cannot be challenged for underestimating the worst impact that could happen; yet, at the same time, the local government and the public can be reasonably assured that impact of such magnitude is unlikely to occur.

Enlightened developers realize that there is little to be gained nowadays—in the courtroom of law or public opinion—from unjustifiably discounting a project's environmental impact just to make a project politically acceptable. Genuine community acceptance is more likely to be gained by the candid disclosure of adverse effects combined with creative means of addressing them, or a sincere presentation of economic or social benefits which may offset negative impact.

*Verify, verify, verify.* Some of the most embarrassing mistakes made by EIR professionals and reviewing attorneys result from the failure simply to check the facts and claims made to make sure they are so. Nothing taints an EIR's credibility so much as one or two glaring inconsistencies.

Confirm that the EIR agrees with itself. Make sure that the conclusions outlined in the summary of the EIR are the same conclusions arrived at in the text. Often, because preparation of an EIR is a long process subject to extensive revision, changes made to a discussion on impact will be forgotten when the summary of impact is revised.

Add the numbers. Lawyers are not accountants, of course, but it doesn't hurt to pull out a calculator and corroborate the numbers used in the EIR. This may well be the first time the EIR's numbers are double-checked. A number of EIR consultants, including traffic, air quality, water quality and other specialists, frequently use

numerical readings to buttress their conclusions. There is far more error in such calculations than might be assumed. Charts and figures supplied by these consultants should be easy to read and easy to verify. Where the number of graphs and charts are extensive, delegate this task or choose a few charts at random to validate.

Compare supporting texts. Each section of an EIR is based upon a few critical documents which generally are kept on file with the EIR consultant. Consult the

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underlying traffic, geology, biology and other reports to make sure the conclusions of the EIR honor the spirit as well as the letter of the reports. Check the most recent copies of the general plan and zoning maps and insure the EIR accurately and fairly represents those documents. Not uncommonly, the conclusions of previously certified EIRs are cited for various propositions. Check these EIRs as well. Be especially cautious when certain underlying documents, relied upon by the EIR, are said to be "unavailable."

Explain the methodology. Despite a litany of cases strongly condemning various EIRs for failing to explain properly how the facts revealed by a study lead to a conclusion on the significance of a particular impact, virtually every modern EIR continues to contain a host of unsupported conclusory statements. An EIR should explain the methodology used to determine the adverse effects for each impact category.

Often, however, it will be difficult to confront the consultant on the issue of methodology, because the lawyer may be unfamiliar or uncomfortable with the terminology or procedures used in assessing impact. Again, it is the lawyer's duty to ensure that the discussion in the EIR clearly and logically relates the facts supplied to the conclusion stated. Affirmatively challenge the consultant as to whether any other methodology exists, why a particular methodology was chosen and whether the application of any other

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## EIRs

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methodology might change the conclusion of significance.

For example, ask the consultant whether freeway impact would be more accurately quantified by focusing on on-ramp and off-ramp traffic volumes or whether an "hours of delay" study might provide a more meaningful analysis. Consider checking other recent EIRs for similar projects to compare methodologies used by different consultants.

Examine to what extent the methodology chosen by the consultant is designed to lead to the stated conclusion. In identifying impact on wildlife, for example, a trapping program conducted in mid-February would be unlikely to catch animals that may be hibernating or those that appear most often in the summer.

Uncertainties exist even with the best methodologies and such uncertainties should be candidly disclosed in the text of the EIR. Make sure that the consultant's reasoning in answer to these inquiries is reflected in the text of the EIR.

In many instances, the assumptions used by the consultant are never made explicit; for example, the term "peak hours" may be used repeatedly but never defined. Identify and explain these assumptions in detail.

To forecast cumulative impacts, EIRs often include a "cumulative projects list" which identifies all approved and likely developments near the proposed project that will contribute to an aggregate environmental impact. Pay special attention to the methodology by which the cumulative projects list is derived. Many EIRs will rely upon one list of cumulative projects for all categories of impact. If that list was derived for use only with the traffic impact section, it may not be an appropriate list for other impact sections. Those cumulative projects which are likely to contribute to traffic impact are not necessarily the same ones likely to contribute to sewer impact, for example. The EIR should include a full discussion of how the geographic limits for a cumulative projects list were developed and what criteria were used.

**3. Even if the EIR discusses a particular impact and accurately quantifies its significance, the EIR fails to consider or adopt feasible mitigation measures for the impact.**

If "the heart of CEQA" is the EIR,<sup>9</sup> then the heart of the EIR is its discussion of mitigation measures. The very purpose of conducting an environmental review is to identify and facilitate taking those steps that will make the project more environmentally sensitive.

*Feasible or Infeasible?* Not every mitigation measure offered by an EIR or a commentator to an EIR will necessarily be

feasible. While the EIR need not make a determination of feasibility, it should set forth the facts and issues that will decide the feasibility. For example, gray water recycling and wastewater treatment facilities are relatively new technologies, the cost, effectiveness and healthfulness of which are still in large part unknown. While an EIR may offer these programs as potential mitigation measures for water consumption impact, the EIR should also identify the risks, both known and unknown, that may be involved in their adoption.

*Mitigation deferred is mitigation denied?* Spot and review closely all mitigation measures which the EIR states are to be identified in the future. Deferred mitigation measures are not reasons per se to invalidate an EIR and, in fact, are common in EIRs.<sup>9</sup> The danger occurs when the impact to be mitigated itself is not to be identified until a future date.<sup>10</sup> Of course, the more specifically mitigation measures are described, the better. Thus, deferred mitigation measures should be the exception to the EIR and not the rule, and the impact itself must always be sufficiently characterized and quantified in any event.

*Mitigation measures for mitigation measures?* Keep in mind, during review, that some mitigation measures will themselves result in adverse impact. This is particularly so with traffic mitigation measures where street widenings may impinge on pedestrian walkways or street re-routings may increase traffic in other areas even as they relieve traffic near the project. The impact from mitigation measures should be addressed if the mitigation measure is to be implemented.

*Obligation or mitigation?* The uninitiated attorney will likely find it odd that compliance with laws and regulations, which have to be obeyed anyway, are often listed as legitimate mitigation measures. For example, an EIR, finding that a project's generation of construction noise is a significant impact, may require as a mitigation measure that the developer comply with a city noise ordinance, thereby reducing the impact to a level of insignificance. Presumably, the EIR intends to portray the developer as making numerous environmental concessions by agreeing to perform so much mitigation.

Although case law expressly condones this practice,<sup>11</sup> the client runs a public relations risk. An increasingly cynical public is not only likely to remain unconvinced of the developer's magnanimity, but also all the more likely to view the rest of the EIR with enhanced suspicion. In addition, the practice is difficult to maintain consistently through the text of the document; no EIR can hope to identify all the laws and regulations that must be complied with to reduce environmental impact.

The better practice is to insert, in the text's discussion of the impact itself, a ref-

erence to the law and an explanation that because of such law there is likely to be no significant impact.

4. Even if the EIR discusses a particular impact, accurately quantifies its significance and considers and adopts all feasible mitigation measures for the impact, the EIR still fails to consider reasonable alternatives to the project.

CEQA's *Catch-22*. No other CEQA issue has been as vigorously or as often contested in court in recent years as the comparison of alternatives and alternative sites. Unhappily, a fundamental contradiction in the CEQA law itself has guaranteed that more litigation will follow.

On the one hand, the CEQA Guidelines require that the EIR describe a range of reasonable environmentally superior alternatives "which could feasibly attain the basic objectives of the project."<sup>12</sup> Courts have interpreted this provision to require that only feasible project alternatives be examined.<sup>13</sup> On the other hand, CEQA prohibits a public agency from approving a project if there are feasible alternatives that would substantially lessen the significant environmental impact.<sup>14</sup> Thus, to adopt a proposed project, all alternatives which are not adopted must be shown to be infeasible. The law therefore requires that, at the initial selection of project alternatives, only feasible alternatives be included, but then mandates that those same alternatives be rejected as infeasible at the end of the process in order to proceed with the project.<sup>15</sup>

Because of this schizophrenia in the statutory and case law, discussions of alternatives in contemporary EIRs have evolved to a point where alternatives are in most cases selected solely on the basis of their obvious infeasibility. In other words, alternatives are included for the sole purpose of rejecting them—the very opposite of the reason that CEQA requires a discussion of alternatives in the first place.

There is thus no easy or meaningful way to approach the EIR discussion on alternatives. Under CEQA, the discussion must focus on environmentally superior alternatives. If an EIR openly concludes that every listed alternative is infeasible, the EIR is vulnerable to the charge that the EIR selected only "straw man" alternatives that no one in good faith could have believed would actually be feasible when they were initially selected. On the other hand, if the EIR does not indicate that an environmentally superior alternative is "infeasible," the project cannot be approved by the agency.

*How alternatives were selected is more important than which ones were selected.* Given the inevitable legal challenge facing EIR alternative discussions, the attorney's review should primarily confirm that the discussion adequately details how such alternatives were

selected. The EIR should fully recount how the process of selection was designed to provide a reasonable range of project alternatives and alternative sites.

Central to any such discussion of alternatives will be identifying all of the objectives of the project. Based on a detailed identification of project objectives, alternatives and alternative sites can more easily be meaningfully compared. What is the intended market to benefit from or use the project? What geographic area is the project to serve? What special site characteristics must be kept in mind, such as steep slopes for a ski resort, waterfront location for a beach resort, dry climate for a sensitive scientific facility? What size property is necessary to fulfill the minimum project objectives? List all criteria necessary to ensure the project's viability.

Once the project objectives are specified, the EIR should explain how the selected alternatives, including alternative locations, can and cannot achieve those objectives. Relate how the alternatives were initially selected to mitigate environmental impact. If the selection process is properly documented, the conclusion on which alternative is best may safely be left to the decisionmaker.

The perfect EIR has yet to be written. Ultimately, the determination of when the document is battle-ready is the client's. It is the attorney's job, however, to make sure the client knows where the weak chinks in the armor lie, so that when the arrows begin flying, the client is well prepared to take the risks. ♦

<sup>1</sup> PUB. RES. CODE §§ 21000-21177.

<sup>2</sup> 14 CAL. CODE REG. §§15000-16041.

<sup>3</sup> Concerns about the potential conflict of interest when a developer, and not the public agency, prepares the EIR were addressed by *Friends of La Vina v. County of Los Angeles*, 232 Cal. App. 3d 1446 (1991) and resulting legislation (see PUB. RES. CODE §21082.1), which condone the existing practice whereby private proponents may submit a draft EIR to the local agency, so long as the agency "independently reviews, evaluates and exercises judgment" over the issues raised herein.

<sup>4</sup> *Citizens of Goleta Valley v. County of Santa Barbara*, 52 Cal. 3d 553, 568, (quoting *Seacoast Anti-Pollution v. Nuclear Regulatory Com'n* (1990) 598 F. 2d 1221, 1230-1231 (1st Cir. 1979)).

<sup>5</sup> Council on California Competitiveness, *California's Jobs and Future* (1992) at 37.

<sup>6</sup> PUB. RES. CODE §21092.1; *Sutter Sensible Planning, Inc. v. Board of Supervisors*, 122 Cal. App. 3d 813 (1981).

<sup>7</sup> For example, there are a number of procedural prerequisites that must be complied with, including consultation and public and agency participation, that are beyond the scope of this article.

<sup>8</sup> CEQA Guideline 15003.

<sup>9</sup> See *Sacramento Old City Association v. City Council of Sacramento*, 229 Cal. App. 3d 1011 (1991).

<sup>10</sup> *Sundstrom v. County of Mendocino*, 202 Cal. App. 3d 296, 308 (1988).

<sup>11</sup> *Id.* at 307.

<sup>12</sup> CEQA Guidelines § 15126(d).

<sup>13</sup> *Citizens of Goleta Valley v. County of Santa Barbara*, 52 Cal. 3d at 569.

<sup>14</sup> PUB. RES. CODE §21002.

<sup>15</sup> The recent case of *S.O.R.E. v. West Hollywood*, 9 Cal. App. 4th 1745 (1992), noted the irrationality of requiring a discussion of infeasible alternatives, but did not address the fact that EIRs routinely include just such discussions.