The Art of the Response to Comment

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Agenda

- Intent of the program
- CEQA Requirements
- Approach to Preparing Response to Comments
  - MND/ND
  - EIRs
  - Recirculation: when and why
  - General Format and Practice Pointers
- Questions and Answers
INTENT OF THE PROGRAM
Intent of the Program

- Understand the methods and requirements for preparing response to comments
- Understand how response to comments can be used to build the administrative record
- Provide format guidance and practice pointers for organizing and responding to comments
CEQA Requirements

- Cat Ex – no statutory requirements to respond to comments
- MNDs/NDs – no statutory requirements to respond to comments
- EIR’s – mandatory to respond to comments that raise environmental issues
PREPARING RESPONSES – MND/ND
MND/ND – CEQA Requirements

- No statutory requirements for preparing response to comments
- Notify agencies when a public hearing is held (CCR §15073[e])
- Agencies shall consider the MND with comments received (CCR §15074[b])
Always respond to comments received, preferably in writing

Use the agency’s preferred process/format
- A simple memo addressing each comment
- Formal response to comment addendum

Plan for preparing responses in your schedule

Address the comment as you would in responding to an EIR

If verbal comments received, provide a response (verbal or written) prior to project approval.
What if comment identifies a new significant effect?

- If mitigable, must recirculate the document (CCR §15073.5[b])
- If not mitigable, prepare an EIR (CCR §15073.5[d])

What happens if mitigation needs to be changed or enhanced prior to project approval?

- Agency may substitute for equivalent mitigation
- Must hold a hearing and adopt a written finding (CCR §15073.5[c])
PREPARING RESPONSES - EIR
CEQA Requirements – EIR

- Agencies must “review, evaluate, and prepare written response to comments on environmental issues received on an EIR.” (CCR §15088)
  - Disposition of significant environmental issues raised should be described
  - When an agency disagrees, response must address comment in detail
  - Must provide a good-faith, reasoned analysis
  - Conclusory statements without facts are not adequate
Have a good organization system

- Table with commenters listed
- Numbering/Lettering system
  - Federal, State, Local agencies, groups, citizen
  - By date/time received
- Where should elected officials fall?
- How do you address public transcripts?
- Address all parts of the comment letter
Stand-alone document or reproduce the entire DEIR?

- Stand alone, requires section to describe DEIR changes
- Reproducing DEIR involves a large document where changes may be throughout

Do you summarize the response or not?

- If you summarize, be objective and address all points/issues
Master Responses

► When should you use master responses?
  – When the same issue is raised multiple times
  – When a series of related issues could benefit from a larger more integrated discussion

► Where should the master response be located?
  – At the beginning of responses to comments
  – First time raised

► Pitfalls
  – Using a master response as a catch all
  – Sometimes master responses elevate the “importance” of an issue
Master Responses

- Great efficiency tool
- For complex subjects
  - List all issues raised in multiple comments
  - Develop response that addresses all key issues raised
  - Conclude if “significant new information” is raised
- When cross referencing Master Response, also address other unique issues in comment
“The EIR did not address impacts to air quality, noise, the presence of the red-headed flatbush, traffic or potential historic significance of the 150 year-old buildings that will be demolished”

Response: Comment noted
Best to develop a standard response for comments that don’t address environmental issues.

- No further response is necessary because no issues related to the adequacy of the environmental impact analysis in the DEIR were raised.

- The issue raised by the commenter addresses the merits of the project and does not raise any issues with the environmental analysis provided in the DEIR. No further response is necessary.

BUT, tailor as needed to be sure comment is appropriately addressed.
Preparing a Response

- Responding to comments is an ART and a SCIENCE
- Only required to respond to environmental issues raised.
- Must provide clear, distinct, and factually supported responses
Preparing a Response

Interpret the comment for what it is

– Don’t read more into it; address issue raised, nothing more, nothing less
– Don’t let personal bias sway your approach/response
– Identify the issues raised and respond to each
– If unintelligible, so state (kindly, please!)
Determine if comment addresses an environmental issue, but is non-specific.

Comment

“We disagree with the conclusion regarding traffic impact. The project will result in significant impacts to local roadways.”

Response

“The project’s traffic impacts were evaluated consistent with the requirements of CEQA in Section 4.11, ‘Transportation and Circulation,’ of the DEIR. As described therein, the project would not result in any significant impacts under project or cumulative conditions (see page 4.11-9). The commenter does not offer any evidence on how the project would result in significant traffic impacts; therefore, no further response can be provided.”
When stating the EIR addressed the issue, be specific

“The analysis of San Bernardino horned gnatstabbers is provided on page 4.5-6 of the Draft EIR. See, in particular, paragraph 3 on that page, which describes the time of year when this species is present on the site (January through March) and the fact that impacts are most sensitive during the nesting component of its stay (early February through mid March).”
“The commenter requests that a formal wetland delineation be prepared prior to project approval. As noted on page 4.3-13 of the Draft EIR, a formal wetland delineation has been prepared. The findings of the Draft EIR indicate…. [summarize the text of the Draft EIR]… Please also refer to response to comment 1-5.”

OR

“As noted on page 4.3-13 of the Draft EIR, a formal wetland delineation has been prepared. The findings indicate…. [summarize the text of the Draft EIR]… Please also refer to response to comment 1-5.”
Changes to the DEIR
What happens when the text of the EIR needs to change?

- Identify in comment
- Show in separate section or re-published DEIR
- Identify all changes even if minor
- Identify where the change occurs specifically
- Provide context to reader
- Don’t forget tables and exhibits too
Comment 5-4 notes that the agency is the USFWS, not the DFG. The commenter is correct. This change is also presented in Chapter 4, “Corrections and Revisions to the DEIR.” This change does not alter the conclusions with respect to the significance of the impact.

Paragraph 2 on page 3.12-3 is hereby revised to read as follows:

“Under the proposed action, the DFG USFWS is the responsible agency.”
RECIRCULATION
The Question of Recirculation

EIR Process

1. Notice of Preparation (CCR §15082)
2. Early Consultation (§15083)
3. Draft EIR (§15084)
5. Final EIR (§§15088-15089)
6. Certification and Project Approval (§§15090-15094)
The Question of Recirculation

EIR Process

1. Notice of Preparation (§15082)
2. Early Consultation (§15083)
3. Draft EIR (§15084)
5. Final EIR (§§15088-15089)
   - Recirculation of EIR Prior to Certification (§15088.5)
6. Certification and Project Approval (§§15090-15094)
Circumstances Requiring Recirculation

Laurel Heights Improvement vs Regents of UC (1993) 6 Cal.4th 1112

“We conclude that recirculation is only required when the information added to the EIR changes the EIR in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible project alternative or mitigation measure that would clearly reduce such an effect and that the project's proponents have declined to implement. We further conclude that a decision not to recirculate an EIR must be supported by substantial evidence.”
Noise: DEIR concluded insignificant
  – DEIR included performance standards
  – Noise study in final EIR in response to comment supported conclusion

Toxic Air Emissions: DEIR concluded no method to evaluate; therefore, too speculative to conclude
  – FEIR used “experimental studies” and concluded no significant health risks, but stated because data incomplete, same unknown impact as stated in DEIR
  – Findings: treated impact as if it could be unavoidable, and adopted Statement of Overriding Considerations
  – Again, FEIR conclusions were not in conflict with DEIR
Night Lighting and Glare

- Not addressed in DEIR
- In response to comments, issue analyzed, concluded as LTS, **and** mitigation added
- Argument that this was significant new information, requiring recirculation
  - Court concluded mitigation was not required, mitigation would not create new significant effects, and Regents did not decline to adopt suggested mitigation

No significant new information; therefore, no need to recirculate EIR
Recirculation Requirements: CCR §15088.5

- Recirculation after DEIR required if “significant new information” added to EIR
  - New significant impact
  - Substantial increase in severity of an impact unless mitigation adopted to reduce impact to level of insignificance
  - Feasible alternative or mitigation “considerably different” from others in DEIR would clearly lessen significant effects, “but the project proponents decline to adopt it”
  - DEIR was so fundamentally inadequate and conclusory that meaningful public review precluded

- Need only recirculate those parts of the EIR that need to be modified.

- Same review period as DEIR
a) DEIR concludes “up to 4 acres of wetlands” would be converted based on review of aerial photographs. Mitigation to LTS based on 1:1 replacement. Delineation in FEIR concludes 5 acres of wetland would be converted. Mitigation remains 1:1.

b) 5 intersections would be significantly affected. Mitigation would reduce impacts at 3 to LTS. FEIR concludes 3 additional intersections would be significantly affected, but all can be mitigated to LTS.

c) Same as b), but of the 3 additional intersections, 2 can be mitigated to LTS and 1 would be significant and unavoidable.
d) Hydrology scoped out of DEIR. FEIR concludes a significant impact to hydrology can be mitigated to LTS.

e) Hydrology scoped out of DEIR. FEIR concludes a significant impact to hydrology, but no feasible mitigation.

f) Hydrology scoped out of DEIR. FEIR concludes a significant impact to hydrology, feasible mitigation to reduce to LTS, but not adopted.

g) Other examples?
PRACTICE POINTERS
Preparing a Response

- Do not take comments personally, even if the commenter says the EIR was prepared by idiots.
- Don’t use humor or sarcasm even in administrative drafts.
And as it says in their administrative Final EIR, “Well, Mr. Johnson, if you weren’t such a whiner, maybe I would care more about traffic noise at your house. 😊”
Other Considerations in Preparing Responses

- Address all points raised in a comment
- Bracket comments so multiple topics are avoided
- Explain why you are NOT addressing certain issues:
  - Comment on merits of project
  - Comment on social or economic issues
- Determine disposition of environmental issue raised:
  - “Therefore, the conclusions in the DEIR regarding the significance of the impact are not changed by the comment.”
  - In response to the comment, and considering additional information, the conclusions in the DEIR regarding the significance of the impact are revised to indicate it is a significant impact because…”
Other Considerations in Preparing Responses

If conclusions on impact significance are changed in response to comments:

- Indicate if the impact can be reduced to a less-than-significant level.
- Conclude whether circumstances requiring recirculation apply, and if so, whether the entire response to comments document is being recirculated, or only the applicable response (strategy may suggest you “flash” responses to all comments on controversial projects).
EIR should not be a legal treatise
Always use CEQA Statute and Guidelines first
Reference to case law can help:
- Question of interpretation of Statute or Guidelines
- When the only direction available is judicial guidance. Examples:
  - Water supply evaluation (*Vineyard Area Citizens for Responsible Growth*)
  - Regulatory Standards vs Evidence of Impact (*Berkeley Keep Jets Over the Bay*)
QUESTIONS?
Thank you.

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