

Earth Law Teach-In

Earth Day
April 22, 2020

<https://coolworld.institute>



Using the Environmental Impact Assessment Process to Fight for the Environment



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Cool World Institute

- ▶ Cool World Institute is a project of Advocates for the Environment, a Los Angeles-based environmental law firm and advocacy organization.
- ▶ Litigation is THE superpower for lawyers.
- ▶ Its mission is to facilitate climate litigation internationally:
 - ▶ By cross-fertilizing between countries
 - ▶ By bringing together climate litigators to share ideas
 - ▶ By researching potential legal claims and making the research available to litigators
 - ▶ By organizing certain types of climate litigation
- ▶ We have been litigating against climate disruption in Los Angeles since 2011.
- ▶ I am a California attorney and Executive Director of Advocates for the Environment and Cool World Institute



Advocates for the Environment

*A non-profit law firm
and advocacy organization*

Agenda for This Talk

- ▶ International Perspective - based on a talk given at Climate Law and Governance Day in Madrid in connection with COP25
 - ▶ Environmental Impact Assessment (EIA) is the international term for what is called an Environmental Impact Statement (EIS) under U.S. NEPA, and an Environmental Impact Report (EIR) under California CEQA.
- ▶ Climate Litigation Toolkit Overview
- ▶ Environmental Impact Assessment Process
 - ▶ By just participating in the administrative process, an activist can help the climate.
 - ▶ There are often good opportunities for litigation at the end of the EIA process.
 - ▶ The lawsuits are relatively inexpensive, within the reach of citizen's groups and environmental NGOs.

Climate Litigation Toolkit

- ▶ “Big” lawsuits, like Juliana and Urgenda, get most of the media attention.
 - ▶ They are very expensive, and are designed in part to garner publicity, as well as to get meaningful remedies from the courts.
- ▶ There are “smaller” lawsuits that can be effective in many jurisdictions around the world. Their characteristics:
 - ▶ They can be brought by NGOs.
 - ▶ They cost comparatively little to bring.
 - ▶ They will fight climate change, by providing a remedy that helps the climate, or publicity of the issues, or by forcing bad actors to spend resources on litigation.
 - ▶ They will work in many different jurisdictions around the globe.
- ▶ We have started an online Climate Litigation Toolbox on our Web site: CoolWorld.Institute
 - ▶ We would be glad too have the help of other environmental lawyers in finishing the toolkit.

Environmental Impact Assessments - Overview

- ▶ Hundreds of countries require EIAs for projects that may have significant environmental impacts.
- ▶ The EIA is a written document that the project proponent (in most cases) must prepare, describing the project's environmental impacts.
- ▶ Purpose is to ensure that the public and decision-makers understand the environmental consequences of approving the project
- ▶ In some jurisdictions (e.g. USA), mitigation measures and alternatives must be included, and all feasible mitigation is required.
- ▶ The public, including NGOs, has the right to participate in the EIA process, by reviewing and commenting on the EIA.
- ▶ NGOs often have standing to sue for violations of the EIA law. In most jurisdictions, project approvals can be voided for certain violations.

EIA Process (generalized)

- ▶ Screening - which projects are subject to EIA requirements?
 - ▶ Smaller, less-formal EIAs may be allowable for projects with lesser environmental impacts.
- ▶ Scoping - which environmental impacts should be analyzed?
- ▶ Impact analysis - drafting of the EIA
 - ▶ The public usually has a right to access the EIA as a public record
- ▶ Public comment - potentially leading to revisions in the EIA
 - ▶ NGOs can usually comment, and such commenting can provide a good opportunity to influence government actions on climate change relatively inexpensively.
 - ▶ If litigation is contemplated, it's usually a good idea to engage lawyers to help with commenting.
- ▶ Project Approval - EIA and project usually approved together
 - ▶ Approval often at, or just after, public hearing
- ▶ Litigation, possibly

EIA Litigation Issues - 1

- ▶ Standing - who has the right to sue?
 - ▶ For cases in federal court in the U.S., an NGO must show that it, or one of its members, has been injured by the approval being challenged.
 - ▶ In civil-law countries, standing is controlled by statute. For example, in France the environment code gives standing to NGOs whose purpose includes protection of the environment.
 - ▶ In California, standing is seldom an issue.
- ▶ Exhaustion of administrative remedies
 - ▶ The NGO, or its members, must have commented on the project and/or the EIA during the administrative process leading to project approval.
 - ▶ Grounds for the lawsuit may be limited to issues raised during the administrative process.
 - ▶ If appeals are available, the NGO must take them before suing.

EIA Litigation Issues - 2

- ▶ Stays and injunctions
 - ▶ In the U.S., filing an EIA lawsuit does not stay the project
 - ▶ But the plaintiff may seek a preliminary injunction to stop the project until the court decides the case.
 - ▶ In most cases, the developer will not proceed with the project while litigation is pending because the case might result in requirements to change the project.
- ▶ Settlement
 - ▶ The filing of an EIA case gives the plaintiff NGO more leverage to obtain environmental improvements in the project from the project proponent via settlement.
- ▶ Remedies
 - ▶ The most common remedy is for the court to order the EIA and project approvals set aside, until the EIA is corrected to make it conform to the law.
- ▶ Attorney's fees
 - ▶ In the U.S., prevailing plaintiffs may recover their attorney's fees from the project proponent, but proponent may not recover from plaintiffs if it prevails.

Example EIA Case: Newhall Ranch, USA

- ▶ Newhall Ranch, Los Angeles County, California USA.
 - ▶ A new city proposed for the floodplain of the Santa Clara River.
 - ▶ 21,308 homes on 12,000 acres; 629 acres of mixed-use development, 67 acres of commercial, 249 acres of business park.
- ▶ EIRs for first two phases contained argument that the project's GHG emissions were not "significant" under CEQA, therefore no mitigation required.
- ▶ Petitioner NGOs sued under CEQA, on a variety of grounds, including GHGs.
 - ▶ Petitioners lost in trial court and California Court of Appeal.
 - ▶ California Supreme Court invalidated portion of EIA analyzing GHG emissions.
- ▶ Newhall decided to modify the project to be "net zero" instead of developing a new argument that GHG emissions would not be significant.
 - ▶ Solar panels on houses, electric-vehicle charging stations, electric buses, and offsets.

Example EIA Case: Lamu Power Plant, Kenya

- ▶ 1050 megawatt coal-fired power plant proposed for Lamu
- ▶ Save Lamu, a local NGO, and five individuals filed suit against the National Environmental Management Authority (NEMA) and Power Company Ltd.
 - ▶ Issue was the completeness and scientific sufficiency of the Environmental and Social Impact Assessment (ESIA)
 - ▶ The Court found that:
 - ▶ There had been inadequate public participation during the process of preparing the EIA and after the EIA study had been published;
 - ▶ Some of the mitigation measures, including mitigation for climate change, were inadequate.
 - ▶ The court, the National Environmental Tribunal, ordered the EIA and the power plant approval set aside.

Example Case: Rocky Hill Coal Project, Australia

- ▶ Gloucester Resources Ltd. v. Minister for Planning (2017)
- ▶ Coal mining company sued the Minister of Planning for denying application to construct an open coal mine in New South Wales
 - ▶ Local NGO joined litigation on side of government
- ▶ Under Australian Environmental Planning and Assessment Act, Court may consider public interest in project in addition to adequacy of EIA.
- ▶ Court upheld Minister of Planning's denial of project approval based primarily on public interest:
 - ▶ “the negative impacts of the Project, including the planning impacts on the existing, approved and likely preferred land uses, the visual impacts, the amenity impacts of noise and dust that cause social impacts, other social impacts, and climate change impacts, outweigh the economic and other public benefits of the Project.”

What Happens after Litigation?

- ▶ Often the delay caused by a lawsuit will stop the project, even if the petitioner loses the case.
- ▶ If the petitioner wins, the usual remedy is a court order setting aside project approvals and the EIA.
 - ▶ The developer must then correct the errors, and proceed again through the process of getting the project and the EIA approved.
 - ▶ Petitioners can sue again over the new EIA.
 - ▶ But, eventually, the developer will correct all the EIA errors and will be allowed to proceed with the project.
- ▶ Sometimes the parties will settle, and the settlement can result in a lessening of the project's environmental impacts.