Eliminating Contract Document Conflicts with Environmental Impact Assessment: An Example from the U.S. Department of Veterans Affairs

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Government agencies, environmental consultants, and the public alike are frustrated by poor the coordination between agency planning and environmental impact assessment (EIA). Contracts for project design, construction, and management too often fail to provide for EIA, or to accommodate its results. A systematic review of standard contract documents and guidelines used by one major U.S. government agency revealed that they seldom took into account the need for EIA or provided for integrating the results of EIA into planning. Correcting these deficiencies was not very difficult. Other agencies may be well advised to undertake similar reviews.

Environmental Practice 18: 270–273 (2016)

Almost 40 years after regulations were issued detailing how U.S. government agencies should conduct environmental impact assessments (EIAs) under the National Environmental Policy Act, many federal agencies still have trouble doing EIA in a timely, efficient, and effective manner.

For environmental professionals working in or interacting with such agencies, their poor EIA records are sources of considerable frustration. For people outside government who want to see the environment given due consideration, poorly handled EIA is evidence that agencies do not take the law (or the environment) seriously. For environmental attorneys, it provides a rich array of litigation targets.

In 2013–15, as a contractor for the U.S. Department of Veterans Affairs, I stumbled upon what I believe to be one important—and remarkably simple—reason that EIA isn't done, or is done poorly, or is biased, or fails to influence decision-making. I feel pretty sure that the problems I discovered are not unique to the agency for which I happened to be working. Those working in or with other agencies might be well advised to see if their employers/clients are similarly routinely and inadvertently backing themselves into inept, untimely, or incomplete EIA, or failing to do anything with EIA's results.

EIA Requirements in a Nutshell

EIA requirements—while they can become unnecessarily complicated in the wrong hands—are relatively simple. Before a federal agency makes a decision to do something to the environment—or to help or permit anyone else to do something—it should figure out what impacts doing that something may have. It should be open with the public as it makes this assessment, and it should try, if possible, to adopt and implement measures to avoid, reduce, compensate for or otherwise mitigate significant impacts that its analysis reveals. Under certain laws, like Section 7 of the Endangered Species Act and Section 106 of the National Historic Preservation Act, the agency must carry out its work in consultation with specified parties and/or with concerned people in general, and in some cases develop binding agreements about how impacts will be dealt with.

As all EIA practitioners know, there are plenty of ways that carrying out these simple requirements can become complicated—through, for example, narrow-minded interpretations of regulatory language and incomprehensible document construction. These are serious issues, but they are not the focus of this paper. What I want to discuss here is one reason some agencies may routinely fail at EIA, by:

1. Failing to undertake it at all,
2. Undertaking it too late in project planning to do any good,

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 doi:10.1017/S1466046616000478

3. Acting like it is someone else's responsibility,
4. Performing it only as a sort of afterthought, and/or
5. Failing to follow through on commitments made or insights gained during the EIA process.

Studying the Department of Veterans Affairs Technical Information Library

From late 2009 until early 2016, as the proprietor of a small veteran-owned limited-liability company engaged primarily in work relating to the impact assessment requirements of the National Historic Preservation Act, I oversaw work for the U.S. Department of Veterans Affairs under an Indefinite Delivery-Indefinite Quantity contract. Our work involved a wide range of activities, at the agency's headquarters and at medical centers, national cemeteries, and other facilities throughout the country.

One important task we were assigned rather late in our contract period was to review key documents in the agency's "Technical Information Library" to see how they addressed historic preservation requirements. The Library is an online compilation of guidelines, forms, standard specifications, and contract templates for use by agency personnel and contractors in planning and managing construction and facility management work; it can be found at http://www.cfm.va.gov/til/. The agency's Historic Preservation Office was frustrated by recurrent cases in which the impact assessment and consultation requirements of the National Historic Preservation Act had seemingly been ignored by agency planners, or attended to only too late for them to be meaningfully attended to. We were asked to see if perhaps the standard guidance in the Technical Information Library was, in effect, leading agency employees and contractors astray.

It was obvious that the requirements of the National Historic Preservation Act could not be addressed in isolation. These requirements overlap significantly with those of the National Environmental Policy Act, so our review considered how Technical Information Library guidance dealt with—or failed to deal with—EIA under both statutes.

The Technical Information Library is very extensive, and we did not review every document it contains. We focused on those that seemed related most directly to the siting and planning of new facilities, to the renovation of existing ones, to landscaping and site engineering, and to real property transactions.

Problems Uncovered

We found the following problems quite consistently with documents in the Technical Information Library:

Failure to Allow or Provide for EIA

In theory, when a federal agency engages a contractor to design, build, or otherwise implement a construction or land use project, one of two circumstances must exist with respect to EIA:

1. EIA is complete, and the contract reflects its results, containing direction to the contractor as to how environmental impacts are to be avoided, minimized, compensated for, or otherwise mitigated; or
2. EIA is *not* complete, and the contractor is tasked with helping complete it, with allowance for contract amendments or adjustments, or new contracts, to accommodate its results.

In key Technical Information Library documents dealing with facility siting and design as well as with renovation, landscaping, circulation planning, and utility planning, we found no allowance for either circumstance; the documents simply exhibited no cognizance that EIA requirements or the products of EIA might exist.

In some cases, of course—perhaps in the majority of cases—there actually may be no pragmatic need to conduct EIA. But by not *allowing* for its conduct, the documents we reviewed virtually committed the agency to violating the law in those cases where EIA *was* a legal and pragmatic requirement. If EIA *did* happen, it would have to happen outside the context of the agency's planning, design, and construction contracts, leading at best to coordinative inefficiencies and at worse to delays, litigation, and other costly—even fatal—flaws in project implementation.

Confusion with Local Design Requirements

Perhaps because many documents were based on contract formats routinely employed in the non-federal real estate and construction industries, there was a fairly common tendency to confuse federal EIA responsibilities with requirements for local (or sometimes state) government design review and approval. For example, we found repeated instances in which standard contract language called for the contractor to acquire all necessary *approvals*, including those ostensibly to be obtained from state and local environmental and historic preservation officials.

https://doi.org/10.1017/S1466046616000478 Published online by Cambridge University Press

There are at least the following problems with such language:

1. U.S. government projects on federal land (for example, on Veterans Affairs Medical Centers) are not ordinarily required to comply with local or state design standards (where these exist). Thus by calling for the contractor to obtain *required* local or state design approvals, a contract might actually call for doing nothing at all. Alternatively, it might place the agency in a position of subservience to a local or state agency that has no real authority to dictate to the agency. Most likely, and most often in our experience, it leads to complicated and fruitless exchanges of correspondence with local and state authorities that serve little practical purpose, while EIA remains undone.
2. When one seeks the approval of a local design or planning body, there is often little consideration of alternative ways to accomplish a proposed project's purpose, and one often seeks approval of relatively advanced plans in which one has invested a good deal of effort and money. EIA, on the other hand, is explicitly supposed to consider alternatives, and to be initiated very early in planning when such alternatives can efficiently be considered. Substituting some kind of design approval for EIA almost guarantees delay, confusion, and controversy.

Placing All Responsibility on Contractors

The quite common direction in the documents for the *contractor* to obtain all necessary approvals creates a further cause for confusion and inefficiency in EIA. EIA, under the National Environmental Policy Act and other federal laws, is a *federal agency* responsibility. Agencies can certainly obtain assistance from planning, architecture, engineering, and environmental contractors, but it remains the agency's responsibility to ensure compliance with the law. Some of the documents we reviewed, and the apparent assumptions of some agency officials with whom we interacted over the years, reflected a sort of "hands off" approach in which the agency left everything to the contractor. Since the contractor invariably lacks the authority to commit the agency to anything, this means that those tasked with doing EIA are unable to take effective action in response to its findings, while those who have the authority to do so may be unaware of what needs to be done.

Assigning Responsibility to Those Unauthorized or Unequipped to Exercise It

Some documents called for seeking "clearance" or "approval" from external entities like the State Historic Preservation Officer, or from internal bodies like the agency's Historic Preservation Office. Not only did this surrender a degree of agency decision-making authority to someone with little or no authority to exercise it, but it assigned work to entities that are never adequately staffed to perform the functions assigned. The Veterans Affairs Historic Preservation Office, for example, has a staff of two, with agency-wide responsibilities. Its staff is physically incapable of reviewing every proposed project.

Little Attention to Transparency and Consultation

Few of the documents we reviewed reflected the fundamental requirements of good EIA practice for transparency, public involvement, and consultation with affected parties (e.g., medical center and cemetery neighbors). For the most part, planning and design were treated as matters of concern only to the agency and its contractor—which very often may be the case, but when it is not, failure to involve and consult those potentially affected can lead to serious and unnecessary complications.

No Provision for Implementing EIA Results

As noted above, not only did the documents we reviewed routinely fail to allow for EIA to be *done*; they also failed to allow for anything to be done with EIA's *results* if and when it *was* done. This is not surprising, of course; if the need for doing EIA is not recognized, one could hardly recognize that its results need to be attended to, but this makes it no less a problem. It can lead to a situation in which, for instance, project planning proceeds in ignorance of decisions made as the results of EIA, and even without knowledge of EIA-based, ostensibly binding agreements that, say, a design will be adjusted to preserve a bit of habitat or an archaeological site. By the time the conflict between planning and commitment is discovered (*if* it is discovered), it may be too late to take corrective action, or to do so without spending undue amounts of time and money.

What We Recommended

In most cases, it was not difficult to find ways to make the documents we reviewed more consistent with real-world EIA requirements. Sometimes this involved inserting simple direction into guidance documents, along the lines of:

1. "Determine whether EIA has been completed."
2. "If not, make sure it is not needed."

https://doi.org/10.1017/S1466046616000478 Published online by Cambridge University Press

3. "If it has been performed, determine whether the contract incorporates its results."
4. "If not, incorporate them."
5. "If EIA is needed and has not been completed, include direction to the contractor to assist the agency in completing it."

In other cases, there were, or could be, sections to be filled in on standardized formats, along the lines of: "Insert here any requirements resulting from EIA."

Sometimes we could be much more specific, directing the reader to particular agency directives and handbooks or to relevant regulations and government-wide standards.

Conclusions

The Department of Veterans Affairs has adopted some of our recommendations and tweaked documents in the Technical Information Library accordingly. Other recommended changes are undergoing review. It remains to be seen, of course, whether the revisions will make much difference, or what additional issues may arise as they are implemented.

It is not my intent here to single out the Department of Veterans Affairs for criticism—quite the contrary. I think the agency is to be commended for developing and maintaining its Library, which represents a good-faith effort to ensure that high standards are employed in the design and implementation of agency projects. The agency should also be commended, I think, for recognizing that some of the Library's contents need adjustment from time to time, and for investing the modest amounts of time and money required to make those adjustments. Reviewing and adjusting the Technical Information Library documents was not difficult, though it was rather tedious and demanded something of a nit-picker mentality. I imagine it will need to be done again from time to time.

My guess, and reason for offering this brief paper, is that other agencies are in more or less the same position as the Department of Veterans Affairs—trying to do the best they can to design and carry out needed construction and land use projects in responsible ways, but burdened with guidance and contracting tools that do not effectively reflect good EIA practice, if they accommodate EIA at all.[1]

Other agencies might be well advised to follow the Department of Veterans Affairs' lead and review their standard planning, design, and construction procedures to see whether they allow for proper EIA. If not, our experience suggests that corrections are not necessarily complicated, costly, or time-consuming to make.

Note

1 Some agencies *have* taken this bull by the horns. Many state transportation agencies, for instance, with encouragement and support from the Federal Highway Administration, have implemented systems to ensure that EIA is performed and that its results are incorporated into project design and implementation.

Submitted August 17, 2016; accepted August 29, 2016