ACHIEVING THE 150-PAGE ENVIRONMENTAL IMPACT STATEMENT (AND THE 15-PAGE ENVIRONMENTAL ASSESSMENT)

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ABSTRACT

Regulations issued by the Council on Environmental Quality (CEQ) to implement the procedural provisions of the National Environmental Policy Act (NEPA) state that the text of environmental impact statements (EIS) shall "normally be less than 150 pages and for proposals of unusual scope or complexity shall normally be less than 300 pages." 40 CFR § 1502.7. Guidance issued by CEQ suggests that environmental assessments (EA) be 10-15 pages in length. "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations," 46 Fed. Reg.18026 (1981), Questions 36a and 36b. Rarely are these page limits met.

This paper will suggest some reasons why EISs and EAs are so lengthy and what can be done to shorten them appropriately while still fully complying with NEPA. Specifically, the paper will address:

- having a clear understanding and statement of purpose and need for agency action to focus the discussion of alternatives and impacts;
- having a clear understanding and statement of the extent of the proposed action (including connected actions) and all reasonable alternatives to focus the discussion of affected environment and impacts;
- obtaining early participation by key staff and decisionmakers to avoid changes in the proposed action, alternatives, and analysis later in the process;
- identifying the significant issues to be analyzed;
- addressing impacts in proportion to their significance;
- presenting only that information that will be useful to agency decisionmakers and the public;
- using appendices, technical reports, and incorporation by reference to the fullest extent possible; and
- using plain language and clear graphics for readability.

INTRODUCTION

The Council on Environmental Quality's (CEQ) regulations implementing the National Environmental Policy Act (NEPA) state that the text of environmental impact statements (EIS) shall "normally be less than 150 pages and for proposals of unusual scope or complexity shall normally be less than 300 pages." 40 CFR § 1502.7. Further, guidance issued by CEQ suggests that environmental assessments (EA) be 10 - 15 pages in length. "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations," 46 Fed. Reg.18026 (1981), Questions 36a and 36b. Rarely are these pages limits met.

THE PROBLEM

There seem to be at least three reasons for federal agencies' inability to meet these page limits. With respect to both EAs and EISs, some fault can be placed in the Offices of the General Counsel. Agency lawyers, rather than researching what may actually be required in a document or defending their position in court, demand that a great deal of frequently useless information be included in a NEPA document for which they are responsible. In this way, they mistakenly believe, litigation can be avoided and, if sued, the agency can argue that "it is in there," regardless of what the issue may be.

In fact, there is no amount of information that can make a NEPA document litigation-proof -- anyone can claim that a NEPA document is "inadequate." What agency lawyers can do is ensure that litigation on a NEPA document, should it occur, will not be successful. Further, insisting that a NEPA document contain extraneous material could actually make litigation more likely if the resulting document is confusing or unreadable.

Another reason why NEPA documents can be excessively long is because both NEPA practitioners and agency lawyers try to "cover" as much NEPA ground as possible in one document. EAs and EISs can be expensive and time-consuming to prepare; therefore it makes sense, they reason, to "cover" as many activities as possible within the scope of the document. In fact, it may be more appropriate to prepare separate NEPA analyses when particular proposed actions are unrelated and/or are not yet ripe for decision.

For EAs in particular, a third reason for lengthy documents is the tendency to prepare a "mini-EIS" instead of an EA. The purpose of an EA is to determine whether the impacts of a proposed action or reasonable alternatives to that action may be significant. The purpose of an EIS is to analyze the significant environmental impacts of a proposed action, and reasonable alternatives. When NEPA practitioners forget the purpose for which they are preparing an EA, the document can expand dramatically. Even more egregious, when a NEPA practitioner purposely prepares an EA rather than an EIS, the document can also be overly long.

SOME SOLUTIONS

Below are outlined some suggestions for achieving a 150-page EIS, or at least one that comes close. Many of these suggestions are also appropriate for preparing a 15-page EA. Keep in mind, however, that compliance with the legal requirements of a "hard look" at environmental impacts cannot be sacrificed in the name of brevity.

Scoping

Use the internal and external scoping process to effectively narrow the scope of the NEPA document. Determine exactly what decision the agency needs to make and tailor the scope of the document to provide the information that is necessary for that decision. Having a clear understanding of the decision to be made (*i.e.*, the purpose and need for agency action) will focus the discussion of appropriate alternatives and impacts to be analyzed.

While keeping in mind the problem of segmentation, do not be afraid to scale down the scope of the document if necessary in order to focus the analysis on proposals that are ripe for decision. For example, one federal agency was being pressured to prepare an EIS on an existing, controversial program. However, the program had already been created by Congress and there was no agency decision to be made regarding that program. While NEPA documents assessing the environmental impacts of various proposals to implement the program were appropriate, preparing a programmatic NEPA document was not, in the absence of any decision to be made on the existence or direction of that program. A programmatic EIS would have been lengthy, confusing, and fruitless.

It is also important to obtain early participation in the NEPA process by key staff and decisionmakers to avoid changes in the proposed action, alternatives, and analysis later in the process. Late entrants to the

process not only slow down the process, but also can cause extraneous analyses or information to be added.

Tiering

The CEQ regulations define tiering as the process of covering general matters in broad EISs, with subsequent, narrower, site-specific analyses incorporating by reference the general issues in the earlier analysis (*see* 40 CFR § 1508.28). This avoids repetition and allows an appropriate level of analysis at particular points in time. Tiering is appropriate from a programmatic EIS to a site-specific statement (*e.g.*, the Department of Energy's (DOE) Waste Management Programmatic EIS and later site-specific NEPA reviews on treatment facilities at particular sites) or from an EIS on a specific action at an early stage to a supplement at a later stage (*e.g.*, DOE's Waste Isolation Pilot Plant EIS that selected a site in New Mexico for the facility and subsequent supplemental EISs to consider different operational alternatives for the facility). Tiering means, however, that earlier discussions do not have to be repeated and that decisions made on the basis of earlier analyses do not have to be revisited.

Incorporation by Reference

Remember the CEQ regulation (40 CFR § 1502.21) that allows the "incorporat[ion] of material into an environmental impact statement by reference when the effect will be to cut down on bulk without impeding agency and public review of the action." The material must be briefly described in the document and be reasonably available. Material that is incorporated by reference is part of the NEPA document (*i.e.*, is part of the administrative record) and can be used by the public and the agency decisionmaker in forming opinions and making decisions. Such material, however, is not physically attached to the NEPA document.

Purpose and Need Section

This section needs to explain the purpose and need for *agency* action, not the need for the document ("to comply with NEPA") and not a justification for the proposed action. This is an important step in the NEPA process. If the purpose and need statement is unnecessarily broad, then the agency will be required to develop and analyze a large number of alternatives (adding to the page count). However, if the statement is unreasonably restricted, the agency will be rightly accused of narrowing the range of reasonable alternatives.

Alternatives, Including the Proposed Action

The proposed action needs to describe all of the relevant aspects of the proposal, including mitigation, that may result in environmental impacts. In general, construction, operation, and post-operational activities (such as site or facility cleanup and closure) should be included. The rate and duration of any environmental releases should also be included, but the impacts of those releases should be addressed later, in the environmental consequences section.

All alternatives should be described to the same extent as the proposed action. However, different alternatives may have similarities to the proposed action and to each other; those similarities should be noted and not repeated.

Having a clear understanding of the extent of the proposed action (including connected actions) and all reasonable alternatives allows a NEPA practitioner to focus the subsequent discussions of the affected environment and potential environmental impacts.

Affected Environment

This section should include a brief description of the area that could be affected by the proposed action or alternatives. Excruciating detail is not necessary; provide only what is needed for the reader to understand the context of the proposed action, alternatives, and significant environmental impacts. For example, including a list of every plant and animal species that exists or could possibly exist in the area is unnecessary. Instead, list only those rare, threatened, or endangered species that have been sighted or are likely to exist in the area and be adversely affected by the proposed action or alternatives. Similarly, providing large amounts of detail about the geologic history of an area is probably not necessary unless there are seismic or hydrogeologic concerns.

In fact, if the proposed action and alternatives will not affect a particular resource, it is perfectly appropriate to state that conclusion, thus eliminating the need to include a description of that resource. In both EAs and EISs, it could be appropriate to include a chart listing the typical environmental resources in one column and, in the second column, either an explanation as to why a resource would not be affected or where that resource and impacts to that resource are described in the document. Note that the explanation as to why the resource would not be affected is critical -- an unsubstantiated conclusion that a resource would not be affected by the proposed action or alternatives is not sufficient.

For EAs, consider combining the Affected Environment and Environmental Consequences sections. There is no requirement in the CEQ regulations for a separate discussion of the affected environment (*see* 40 CFR § 1508.9). However, a brief description of particular resources is generally needed to enable readers to understand the context of the proposal, the alternatives, and the environmental consequences.

Environmental Consequences

NEPA practitioners should focus on the **significant** environmental impacts associated with the proposed action and alternatives. The CEQ regulations state that the determination of whether an impact is "significant" requires consideration of context and intensity (*see* 40 CFR § 1508.27). A useful rule of thumb (although perhaps an oversimplification in some instances) is that a significant impact is one that is likely to affect the decision.

Keep in mind that while the agency decisionmaker is responsible for deciding on the agency's course of action, the public also needs information on which to base their "decisions" on how they believe the agency should act. For that reason, impacts that are of particular interest or concern to members of the public should be considered significant even if a NEPA practitioner believes that they are not significant from a scientific or ecological perspective.

In addition, there may be degrees of significance; that is, some impacts may be more significant than others. Environmental impacts should be addressed in proportion to their signficance.

Appendices

Resist the temptation to pad a NEPA document with appendices. Only material prepared for the NEPA document should be considered for inclusion as an appendix (material prepared for another purpose can be incorporated by reference). However, not all material prepared specifically for a NEPA document should be included as an appendix to that document. Rather, only material that is essential for understanding the NEPA document itself should be included (*see* 40 CFR § 1502.18). Information prepared for a document that is not essential for understanding can be included in technical reports and made available in agency reading rooms as background information. The existence and availablility of these technical reports should be noted in the NEPA document (*e.g.*, included in the Reference section).

Miscellaneous

- Leave out any bias, justification for the proposed action, and self-serving statements. They take up space and will be recognized for what they are.

- Use glossaries and introductory sections to explain technical terms and concepts once, not in every chapter. This not only saves space, but also enhances readability and understanding.

- Use fewer words. Ensure that every word and every sentence is necessary. Eliminate jargon.

- Use aids to enhance understanding. Charts and graphics can frequently provide a better explanation in lesser space than a textual explanation.

Those Pesky Lawyers

The confident, prepared, knowledgeable NEPA practitioner will not let them intimidate. Lawyers may know the law, but practitioners know the facts. Lawyers insisting upon the inclusion of information thought to be extraneous should be made to demonstrate (with appropriate legal citations) why it is necessary to add that information.

CONCLUSION

The 150-page EIS (and 15-page EA) is achievable in many instances, but it requires careful planning and attention to detail. A NEPA practitioner must develop a clear understanding and statement of the purpose and need for agency action. With that, he or she can then develop the range of reasonable alternatives, including the proposed action, and determine how those alternatives may affect the environment. Focusing further, the practitioner can identify which of those impacts may be significant (*i.e.*, important to the decision to be made) and concentrate on analyzing those impacts proportionally to their significance.

When writing the document, practitioners should focus on enhancing readability. Many times this will mean reducing the number of words, clarifying obtuse statements, and using graphics and charts, thus reducing the overall length of the document.

REFERENCES (A FEW RELEVANT CASES)

Readability: *Oregon Environmental Council v. Kunzman*, 614 F.Supp. 657 (D. Ore. 1985) (part of EIS was not "readable" and court invalidated the EIS on this ground; one of NEPA's purposes is to inform the public of possible environmental consequences of actions, and an agency has a duty to provide that information in a readily understandable manner)

"Hard Look": *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972) (NEPA makes environmental protection the mandate of every federal agency)

Kleppe v. Sierra Club, 427 U.S. 390 (1976) (a court should not substitute its judgment for that of the agency as to the environmental consequences of its actions -- the role of the court is to ensure that the agency has taken a "hard look" at the environmental consequences)

Purpose and Need: *City of New York v. U.S. Department of Transportation*, 715 F.2d 732 (2d Cir. 1983) (the scope of alternatives to be considered is a function of how narrowly or broadly onesviews the objective of the agency's proposed action)

Citizens Against Burlington v. Busey, 938 F.2d 190 (D.C. Cir. 1991), *cert. denied*, (the court recognized that the range of reasonable alternatives is limited by the purpose and need; a court will uphold an agency's definition of purpose and need as long as it is reasonable; an agency need only follow a rule of reason in preparing an EIS, extending both to which alternatives the agency must discuss and the extent to which it must discuss them)

Definition of Proposed Action/Connected Actions: *Kleppe v. Sierra Club*, 427 U.S. 390 (1976) (mere contemplation of a certain action is not a proposal requiring the preparation of an EIS)

Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985) (court examined issue of whether two activities (new road construction and timber sale) were "sufficiently related so as to require combined treatment in a single EIS")

Conner v. Burford, 836 F.2d 1521 (9th Cir. 1988) (the "point of commitment" at which the filing of an EIS is required is before any irreversible or irretrievable commitment of resources)

Reasonable Alternatives: *Natural Resources Defense Council v. Morton*, 458 F.2d 827 (D.C. Cir. 1972) (agency must look at reasonable alternatives, not limited to those which the agency can adopt; discussion of alternatives need not be exhaustive; agency cannot disregard alternatives merely because they do not offer a complete solution to the problem; discussion of reasonable alternatives does not require a Acrystal ball inquiry)

Natural Resources Defense Council v. Callaway, 524 F.2d 79 (2d Cir 1975)(content and scope of alternatives to the proposed action depends on the nature of the proposal)

Idaho Conservation League v. Mumma, 956 F.2d 1508 (9th Cir. 1992) (court held that the Forest Service had adequately examined alternatives; agency had identified criteria for alternatives and used a computer program to generate alternatives which met those criteria)

Significant Impacts: *Hanley v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972), *cert. denied* 412 U.S. 908 (1973) (Congress could have decided that every major federal action should be the subject of an EIS, but by adding "significantly" Congress found that the agency find that a greater environmental impact would occur that from any "major federal action;" in deciding whether a major federal action will significantly affect the environment, an agency should review the proposed action in light of the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected)