

## RECLAIMING NEPA

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### ABSTRACT

“Streamlining NEPA” has been a mantra for years, most recently in the context of the need to spend economic stimulus money quickly. Despite these pressures, NEPA analysis and documentation remain cumbersome. *It is time to reclaim NEPA.* This paper will suggest some reasons why EISs and EAs are so lengthy and what can be done to make them less complex 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;
- Promoting meaningful public involvement;
- 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

Over the last 40 years, the purpose of the National Environmental Policy Act (NEPA) seems to have been lost. Instead of simply identifying the environmental impacts of a proposed action and

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alternatives such that the decisionmaker and the public can understand and appreciate those impacts and factor them into decisionmaking, NEPA practitioners and lawyers have turned NEPA compliance into a time-and-money-consuming monster.

*It is time to reclaim NEPA.* The way to start is to simplify NEPA analysis and documentation.

## THE PROBLEM

The Council on Environmental Quality's (CEQ) regulations implementing 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.

There are a variety of reasons for federal agencies' inability to simplify their NEPA analyses and 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.

In fact, insisting that a NEPA document contain extraneous material could actually make litigation more likely if the resulting document is confusing or unreadable. Courts have invalidated NEPA documents because the agency failed to meet the requirement to write NEPA documents "in plain language" (40 CFR §§ 1500.4(d) and 1502.8).

The court in *Oregon Environmental Council v. Kunzman*, 614 F.Supp. 657 (D. Ore. 1985), reiterated that one of NEPA's purposes is to inform the public of possible environmental consequences of federal actions: "An EIS must translate technical data into terms that render it an effective disclosure of the environmental impacts of a proposed project to all of its intended readership." Most recently, an EIS prepared by the U.S. Bureau of Land Management was invalidated because, among other things, it did not foster informed decisions and public participation. "In determining whether an EIS fosters informed decision-making and public participation, we consider not only its content, but also its form..." *National Parks & Conservation Association v. U.S. Bureau of Land Management*, 586 F.3d 735 (9th Cir. 2009).

Another reason why NEPA documents can be excessively long is because of the “we have always done it this way” syndrome. Rather than tailoring an analysis to the proposed action and alternatives actually before the agency, agency NEPA practitioners and lawyers use previous NEPA documents as templates. This can result in the inclusion of information that may have been relevant for different proposed actions and alternatives but that is irrelevant given the proposed action and alternatives now before the agency.

For EAs in particular, another 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.

Preparing unnecessarily lengthy and complex NEPA documents does an extreme disservice to the purpose of NEPA. It fosters the argument that NEPA compliance is time-consuming and costly and should be avoided – or worse, that the statute should be repealed. Moreover, attempting to avoid NEPA compliance results in more litigation, which only adds to time and cost.

## **SOME SOLUTIONS**

Below are some suggestions for simplifying NEPA analysis and documentation while still meeting NEPA’s objectives.

### **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 only that 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.

It is also important to obtain early participation in the NEPA process by key staff, cooperating agencies, 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.

### **Purpose and Need**

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 complexity and the page count). However, if the statement is unreasonably restricted, the agency will be rightly accused of narrowing the range of reasonable alternatives.

Although agencies should take an applicant's purpose and need into account in determining what are reasonable alternatives to the requested action, "[r]easonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant." "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations," 46 Fed. Reg. 18026, 18027 (1981) (Question 2a). An agency "cannot define its objectives in unreasonably narrow terms and may not circumvent this proscription by adopting private interests to draft a narrow purpose and need statement that excludes alternatives that fail to meet specific private objectives." *National Parks & Conservation Association v. U.S. Bureau of Land Management*, 586 F.3d 735 (9th Cir. 2009).

### **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 (and scientific names are not required). Similarly, providing large amounts of detail about the geologic history of an area is probably not necessary unless it is relevant to 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.

Consider whether combining the Affected Environment and Environmental Consequences sections might be appropriate in particular circumstances. 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 or potentially 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).

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 agency actions that could affect them. For that reason, impacts that are of particular interest or concern to members of the public should be addressed, albeit briefly, even if the 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 significance.

Finally, NEPA practitioners should focus the analysis on the differences among the alternatives. If there is no difference among alternatives for a particular resource area, or if there is only one action alternative, then the level of the analysis need not be as extensive as when there are differences among the alternatives or competing alternatives. For example, the level of detail required for a go-no go project decision should be less than that for a decision among several alternative sites.

## **Appendices**

Resist the temptation to pad a NEPA document with appendices – just because it is longer does not mean it is better. 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 needs to be included as an appendix to that document (*e.g.*, the Notice of Intent or public meeting notices). 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 should be included in technical reports and made available if requested. The existence and availability of these technical reports should be noted in the NEPA document (*e.g.*, included in the Reference section).

### **Incorporation by Reference**

Use 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.

### **Public Involvement**

Contrary to popular belief, public involvement is required for both EISs and EAs. Although the public involvement requirements are more formal for EISs (40 CFR §§ 1501.7, 1502.9, 1503.1, 1503.4, and 1506.10(c)), in recent years courts have consistently held that public involvement is also required for EAs. For example, the court in *California Trout v. Federal Energy Regulatory Commission*, 572 F.3d 1003 (9th Cir. 2009), ruled that while NEPA does not require federal agencies to assess, consider, and respond to public comments on an EA to the same degree as it does for an EIS, “an agency must permit some public participation when it issues an EA.” Courts have not stated what kind of EA public participation is required to meet NEPA standards, but they have held that a complete failure to involve or even inform the public about an agency's preparation of an EA would violate NEPA regulations.

A good indication of the potential for litigation is public interest or concern. Thus, more public involvement is better because it allows the agency to understand public concerns and address them in the NEPA process. It also allows the agency to focus the analysis on what is important to the public.

### **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 Nuclear Regulatory Commission’s generic EIS on nuclear power plant relicensing and subsequent analyses of relicensing applications from specific nuclear power plants) or from an EIS on a specific action at an early stage to a supplement at a later stage (*e.g.*, an EIS for proposed oil and gas development in a region and subsequent NEPA analyses to address the impacts of leasing particular sites for such development). 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.

## **Readability**

- 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.
- Minimize the use of acronyms.
- Use aids to enhance understanding. Charts, tables, and graphics can frequently provide a better explanation in lesser space than a textual explanation.

## **CONCLUSION**

Simplifying NEPA analysis and documentation is achievable, but it requires 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 and concentrate on analyzing those impacts proportionally to their significance and on the impacts that differ among the alternatives.

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

Typically, the agency decisionmaker and the public only read the document summary. Given that, NEPA practitioners should strive to prepare NEPA documents that look and read like summaries. Detailed information and technical analyses should be consigned to technical reports that are part of the administrative record and readily available to those who want them.