Fully Disclosing Impacts in NEPA Documentation

By Larry Freeman

Late in 2003 a Draft Environmental Impact Statement (DEIS) arrived in the Shipley Group office. A land management agency had prepared the DEIS to analyze and disclose impacts of proposed grazing regulations on the agency's grazing allotments. The DEIS was programmatic in that it dealt with changes in regulatory actions, not with site-specific on-the-ground actions.

I deliberately do not identify the agency that prepared the DEIS. Nor is my goal to provide an overall critique of this DEIS.

Instead, as I review the DEIS, I see several potential weaknesses in its disclosure of impacts. I view these weaknesses as lessons to be learned from the DEIS. I have provided comments on the DEIS to the agency, and I hope the agency corrects these weaknesses when it prepares the FEIS. If not corrected, these weak spots are potential litigation problems, but only time will tell if the FEIS is litigated or how the courts might decide litigation questions.

Here are four of the lessons to be learned from this DEIS:

1. Existing resource conditions need to be quantified even if these quantifications are broad-brush estimates (as they properly are in a programmatic document).

2. Impacts presented (both in Chapters 4 and 2) should be quantified as to their context and intensity.

3. The comparison of impacts (in Chapter 2) should provide a clear baseline condition against which to compare the impacts of alternatives.

4. Cumulative impacts similarly need to be framed in terms of context and intensity.

The legal premise for the following comments is that EIS must disclose all potential impacts, using their context and intensity as a framework for this disclosure. And these impacts should be framed so that a lay reader can understand and assess their importance. This assumption holds even if the EIS is a programmatic document.

"What I initially looked for were clear and useful summaries… Nowhere did I find summaries of this sort."

The classic legal test asks that the lead agency take a hard look at possible impacts, meaning that the agency has carefully considered all conflicting information and differing viewpoints. If well done, this hard look will constitute a good faith disclosure of all impacts. Notice that this legal viewpoint applies even to NEPA documents that are programmatic in nature. Without full knowledge of potential impacts, a decision maker would be unable to use environment considerations as a way to choose between alternatives.

Chapter 3 discussions in the grazing DEIS provided a lot of technical information but clear summaries of existing conditions were missing.

What I initially looked for were clear and useful summaries, such as this: “Of the currently managed XXX acres of upland vegetation, XXX percentage are in poor condition, XXX acres are in fair condition, and XXX acres are in good condition.” Nowhere did I find summaries of this sort.

In the vegetation discussion in the DEIS, for example, I initially see a list of vegetation types. This list is fine as it is, and it is fairly brief, with thumbnail profiles of each type discussed. Next, I learn that the condition of upland can be measured with different methodologies.

Readers don’t find out what “up” means in a useful sense—are the up acres currently in poor condition but improving? And if improving, when will this improvement produce vegetation conditions that are healthy or productive?

As a lay reader I looked to see if upland vegetation in grazing allotments was currently in good condition, poor condition, or some other in-between status. What I found was a general statement that conditions were improving, but no timeline or context for deciding if improvements were substantial. Then even more puzzling, I learn that the condition of a percentage of the managed acres is now “up”; other percentages are “static,” “down,” and “undetermined.”

These trend percentages do not tell a reader exactly what vegetation conditions are in any meaningful sense. A trend label is a possible starting point for a discussion, but the trend labels end the discussion of upland vegetation in this DEIS. No clear baseline conditions of upland vegetation appear in the DEIS

Readers don’t find out what “up” means in a useful sense—are the up acres currently in poor condition but improving? And if improving, when will this improvement produce vegetation conditions that are healthy or productive (these summary terms are from my lay point of view)? Similarly, I don’t know what “static” or “down” really mean in terms of actual on-the-ground conditions. Again, without a clear sense of what the on-the-ground starting conditions are, trend words don’t provide adequate disclosure of impacts.

Overall, I don’t have a picture of upland conditions that would constitute a clear baseline condition against which to judge potential impacts.

For riparian vegetation, I get another set of percentages. I learn that a certain percentage of riparian acres are “properly functioning.” I also learn that a large percentage of riparian acres are “functioning-at-risk.”

These percentages do not really tell me in terms of the context and intensity what the current conditions of riparian vegetation really are. Are the “functioning-at-risk” acres in severely degraded condition, and how speedily will current grazing practices move these acres over into the properly functioning category?

I next turned to the Chapter 2 summary of impacts to see if it provided clearer summaries of the

baseline conditions relating to vegetation. The baseline information (under the no action alternative) is not much more helpful than was the Chapter 3 information. A statement is that "vegetative cover would increase slowly." I don't see any linkage to actual acres, nor do I know how fast improvements would occur. Does slow mean years, decades, or centuries?

Similarly, for riparian vegetation there is a statement that conditions "would remain static or improve slightly." Again I don't see any time estimates, nor any linkage to the actual percentages listed in Chapter 3. So the summary of impacts in Chapter 2 is even less useful than the information on vegetation in Chapter 3.

Note: I make the assumption that the no action impacts in the Chapter 2 matrix roughly equal the existing baseline conditions. I make this assumption because the text does not state otherwise. This assumption is not correct, however.. More accurately from a NEPA disclosure point of view, the impacts of all alternatives should be estimated to some chosen point in the future—say 2014 perhaps. Then a reader could take the existing baseline conditions (from Chapter 3) and see how they would change over the first decade. These changes would be the impacts of the no action alternative. For example, an impact summary might note that 10 percent of the acres being analyzed (XXX actual acres) would move from poor condition in 2003 to fair condition by the year 2014. Unfortunately, the Chapter 2 matrix seems to be linked to no defined timeframes, so such comparisons are impossible to make.

Impacts presented (both in Chapters 4 and 2) should be quantified as to their context and intensity.

The impacts of no action (existing range management) are not quantified in any measurable way. The Chapter 4 text opens with a comment that vegetation communities "would continue to change over the next 20 years." These changes would presumably include a slow increase in vegetative cover. Nowhere does the text explain what "slow" means. Also, no attempt to link such conclusion language with the actual number of acres judged to be improving. So the target of 20 years (a good conceptual strategy) turns out not to be used for a clear projections of conditions 20 years in the future. This clear and precise use of a target year would be a good disclosure strategy, but it is missing from the DEIS.

The summarized impacts of the Proposed Action are similarly not very helpful in assessing the potential difference between the Proposed Action and No Action.

The impacts of the Proposed Action are described as helping the agency to achieve its "vegetation resource management objectives." This is not an impact level in any sense that I as a lay reader can understand. Also, no timeframe is presented, so the information is essentially rootless in its links back to on-the-ground projections. The 20-year timeframe (as mentioned above) would have been a helpful tool for estimating impacts of the Proposed Action, but it is not mentioned.

Trends for riparian and wetland vegetation under the Proposed Action are said to "improve with the implementation of some actions under consideration." What actions? During what period of time? How much improvement? And what would be the estimated change in number of acres with vegetation of specified value?

The only quantifications mentioned about riparian is that improvement of "properly functioning" would occur "at a rate of 1.5% annually." The text does not explain what this 1.5 percent improvement means. Is it a 1.5 percent increase in improved acres or is it
1.5 percent change in the labeled allotments (thus a change in management labels)? Similarly, a second trend of 3.5 percent is mentioned in regard to "functioning at risk with an upward trend." From the text, I am not at all clear as to what the 3.5 percent figure really means. Does the change refect acres or merely the agency's management labels?

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The trend percentages look like quantifications, but they turn out to be vague and unclear, at least to me. Usually percentage figures should be linked to actual acres or miles of streamside vegetation. Such linkages make a percentage understandable to readers.

Given the preceding problems, the disclosure of impacts on vegetation is not clear enough for a lay reader to understand how the alternatives differ in their potential future impacts (a key legal purpose of the whole DEIS and of the Chapter 2 matrix of impacts in particular)..

The comparison of impacts (in Chapter 2) should provide a clear profile of impacts against which to compare alternatives.

Chapter 2 of the DEIS does have a matrix summarizing impacts. That matrix is a good compliance strategy. The bad news is that the matrix really does not present measurable or understandable impacts on vegetation (the resource of concern in my review comments).

The matrix information on vegetation impacts continues the same general language given in the text. Vegetation is said to "increase slowly." And riparian vegetation would "remain static or improve slightly." Such comments are not helpful if readers don't have a any timeframe nor a estimated number of acres to use to judge the comments.

Yes, summary comments in Chapter 2 are often fairly general in many DEISs, but a general summary is only possible if the text in Chapters 3 and 4 presents clear evidence as to what "increase slowly" means. As I show earlier in these review comments, Chapters 3 and 4 do not present measurable impacts. Even a programmatic DEIS should be clear and understandable as to the impacts being projected, usually to a chosen target year in the future.

Cumulative impacts similarly need to be framed in terms of context and intensity

The topic of cumulative impacts appears at the very end of Chapter 4.

The text on cumulative opens with the CEQ definition of cumulative but then immediately goes on to note that cumulative impacts (if they even exist) will likely occur "regionally or locally." This comment and the text surrounding it imply that cumulative impacts for this programmatic DEIS are

not possible to describe (because they are going to change based on site-specific action).

Even at a programmatic level, however, an agency is responsible for estimating the cumulative impacts. And in some ways, cumulative impacts are more central to a programmatic analysis than to a limited site-specific analysis. After all, cumulative legally must look at broad actions, occurring over decades and over broad acreages. Many site-specific projects have no estimate of cumulative impacts precisely because the analysis area is not extensive enough to have measurable impacts.

Surely the agency should profile the overall conditions of vegetation in the acres they have been and are managing. What are the effects of historic grazing practices? What were the overall range conditions before the passage of the Taylor Grazing Act in XXX? Then in a cumulative perspective, what would be the effects of proposed changes to grazing practices? Yes, estimated effects would cover thousands of allotments and millions of acres. But such broad impact analyses are precisely the point of most cumulative impact discussions.

Instead of addressing such cumulative impacts, the text lists three national initiatives (including the National Fire Plan) that will affect overall grazing practices and the status of resources. The text observes that these initiatives would work with the proposed changes in grazing rules. But essentially, the text is saying that cumulative impacts are not really definable because these initiatives have yet to be firmed up. Yet a key legal requirement of cumulative analysis is that agencies look at "reasonably foreseeable future actions." Surely actions under these three initiatives are themselves "reasonably foreseeable."

To conclude its presentation of cumulative impacts, the DEIS notes that "the other related programs being initiated or contemplated at this time will cumulatively enhance and increase positive outcomes and effects. . . ." This conclusion, while reasonable on its face, does not provide an estimate of the actual level and type of cumulative impacts expected. What sort of positive outcomes? Of what magnitude? Over what period of time?

So once again, the text is presenting information that fails to disclose clear and understandable impacts. This failure is ultimately, in my view, a potential litigation question, unless, that is, these problems are clarified with rewritten and supplemented text in the FEIS. After all, the primary purpose of an FEIS is to correct problems in the DEIS.