

NEPA Decisions— Previous and Future

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In an Environmental Assessment (EA) or Environmental Impact Statement (EIS), we at *The Shipley Group* recommend explaining the relevant operational and NEPA decisions that agency decisionmakers have already made and the operational and NEPA decisions that must soon be made. The following essay gives reasons and examples of **why** we recommend that the EA or EIS explain the relevant past and soon-to-be-made decisions.

CEQ Regulations Require Agency Decisionmaking Protocol

The CEQ Regulations' the **very first section**, Part 1500.1(c) *Purpose*, states:

*Ultimately, of course, it is not better documents but **better decisions that count**. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to **help public officials make decisions** that are based on understanding of environmental consequences. . . . [our emphasis]*

Later, in Part 1505 *NEPA and Agency Decisionmaking*, the CEQ Regulations state that each Federal agency must adopt a decisionmaking protocol. In section 1505.1 the CEQ Regulations state that agencies must designate decision points and prepare and use relevant environmental documents when making decisions. In the next section, 1505.2, the Regulations suggest the form and content of decision documents. We summarize and reorder this section in the following list:

- State the decision—which alternative has the decisionmaker selected to implement.
- Explain the monitoring and mitigating enforcement program that is part of the selected alternative.

- Give the rationale for this decision—using agency statutory mission, national policy, and technical, economic, environmental, and any other relevant factors.
- Identify and discuss the other alternatives considered and explain why these were not selected.
- In a ROD (Record of Decision), identify the *Environmentally Preferable Alternative*. If the Decisionmaker does not select this alternative (which is often the case), she/he must explain why it was not selected.

Previous Higher-Level Decisions Must Be Explained

Sometimes, previous decisions limit the decision(s) that the local agency decisionmaker can make. To comply with the legal requirement of **open, full, disclosure** EAs and EISs, agencies must explain to the interested and affected public these previous decisions.

For example, the President and Congress of the United States sometimes mandate that an agency act—to build a stretch of highway, to upgrade or modify a dam, to restore a reach of a flood-damaged river, or to design, build, test, and deploy some new military equipment. Under proper authority, they have decided that the project **will** go forward. An assigned agency's decision space is to determine exactly **when**, **where**, and **how** to do the work—not whether to do the work.

A Specific Example

Assume that working cooperatively, the President, the Congress of the United States, and a State legislature pass a law requiring that a very long 4-lane road be built from mile-marker 1 to mile-marker 620 along an existing 2-lane route. Assume also that this route goes through several very sensitive historic and environmental areas where significant effects will occur when the project goes forward. Because Federal funds are involved, the State Highway Department must comply with NEPA and write an Environmental Impact Statement.

Some persons opposed to this project in whole or in part might argue that the local Federal highway official should select the No-Build Alternative—killing the project. However, the local Federal Highway official cannot make that decision because the President, the Congress, and the State have already foreclosed this particular lower-level decision.

Another Specific Example

Sometimes, a previous decision in an EIS, EA, or in an approved Land-Use Plan limits later decisions. Assume that in a Forest Plan, certain parts of that Forest have been designated for timber production and harvest. The decision now facing the District Ranger is not **will** we produce and harvest timber, but **how** to produce and **how** and **when** to harvest. Some people in opposition to the policy of timber production and harvest might attempt to force the local District Ranger of this particular part of the Forest to change this policy. But the District Ranger does not have the authority to change this policy. A Forest-wide policy change is not within the scope of this EA or EIS.

Two Examples of Lower-Level Decisions

The following is a typical project level—lower-level—decision that a Corps of Engineers District Engineer must make in an EA or EIS.

1.5 Decision That Must Be Made

The District Engineer must decide if the Corps of Engineers should issue Greg Hollingsworth a permit under the CWA 404(b)(1) guidelines to allow him to fill in 3 acres of wetlands and build a hunting/fishing lodge, dock, and storage building on the site (identified in section 1.1 above) as he proposes.

Or

If the Corps should issue the permit with specific mitigation and monitoring measures to protect the wetland and other environmental resources.

Or

If the Corps should deny Mr. Hollingsworth the permit.

1.5 Decisions That Have Been and That Now Must Be Made

A Previous Decision

The Director of MDO (Missile Defense Organization) has already made the decision to launch TMD (Theater Missile Defense) test missiles from three sites on Wake Island based on an EIS/ROD completed in 1992 by MDO. This EIS contains launch criteria for three sites. Each of the three sites has unique testing advantages. The decision to launch from any of the sites will be made **after** an analysis team has completed and documented a separate environmental analysis for each class of launches, such as the class of **fixed, above-ground** launches discussed below.

The First Decision—Operations Related

The Director of MDO must now decide whether or not to proceed with the currently proposed **fixed, above-ground** launching of target and defensive TMD missiles and the construction of required program-support facilities on Wake Island. The decision to evaluate only **fixed, above-ground** launching of TMD missiles complies with Article VII, paragraph 12(d) of the Intermediate-Range Nuclear Forces Treaty.

If the Director decides to proceed, he must approve the TMD launch operational system design, the schedule, the related infrastructure improvements, and the new construction.

Another Previous Decision—Scope of Decision

This decision covers only activities on Wake Island and the missile flight corridor over the open ocean. It does **not** cover the related target and defensive launches from Kwajalein Atoll, which the U.S. Army Kwajalein Atoll EIS/ROD (1993) **has already covered and approved.**

Also, this decision does **not** cover the HERA booster because the TCMP EA/FONSI (1993) **has already approved** its use.

The Second Decision—NEPA Related

If the Director decides to proceed with these launching and construction activities on Wake Island, he also must determine if the proposed action would or would not be a major, Federal action significantly affecting the quality of the human environment and if it complies with all other relevant environmental laws.

If the Director determines that the proposed TMD launch activities on Wake Island would cause significant environmental effects, then BMDO must prepare an EIS (Environmental Impact Statement) with an accompanying ROD (Record of Decision) before testing can begin.

If he determines that proposed TMD launch activities would **not** cause significant environmental effects, he can prepare and sign a FONSI (Finding of No Significant Impact) and the construction of the launch and other program-related facilities could begin immediately.

These types of **previous** and **future** decisions must be explained in EAs and EISs so that the interested and affected public can be fully informed—**open, full disclosure**—and thus can respond properly. Concerning decisions that deal with policy changes, members of the public should direct their opinions to the higher level where the previous policy decisions were made—which often are at the Presidential, the Congressional, and State-legislative levels, **not** at the local level.



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