

Government Decisions and NEPA: Making Sound Decisions with Uneven and Unconvincing Information

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Sound governmental decisions must rely on credible information. Otherwise, a decision is likely unwise and may be legally challenged as arbitrary and capricious.

Credible information is the key to good National Environmental Policy Act (NEPA) decisions. But all sorts of other governmental decisions confront the problem of having information that is credible, from a reliable source.

Look no further than the current issues of today, where good information is essential in making good decisions. I will list a few: AIDs, USDA BSE test (mad cows' disease) reporting, Healthy Forest Initiative, ESA, Wildfire Rehabilitation, ANWR, Federal Energy Policy, Public Education, National Healthcare, etc.

Aren't the same problems potentially present in many NEPA analyses? NEPA analyses are not as momentous as are many of the other examples, but agency NEPA decision makers and resource specialists have many of the same problems as they wrestle with NEPA information that is not clearly credible.

NEPA specialists forecast resource problems but their forecasts are not always credibly explained. Conflicting scientific and technical information is only occasionally recorded. And agency NEPA decision makers may be tempted in the name of brevity and clarity to eliminate dissenting information from the legal record.

Specialists and agency managers create credibility when they do the following:

- 1. Frame questions and uncertainties concisely yet honestly.**
- 2. Establish the relevance of applicable scientific or technical information.**
- 3. Eliminate for well-explained reasons scientific or technical information deemed not applicable.**
- 4. Guard against inappropriate managerial influence on a specialist's conclusions.**
- 5. Verify that the final summary information is professionally accurate and complete.**

As discussed below, the preceding five suggestions are some features that agencies should build into every NEPA analysis and its associated documentation. Too often, however, NEPA teams only occasionally come together as a team. No wonder many of the resulting EAs or EISs include uneven and possibly inconsistent discussions of resource impacts.

- 1. Frame questions and uncertainties concisely yet honestly.**

A variation of the old adage is "a problem or question well explained is half of the answer." NEPA decisionmaking should begin with clearly explained problems or questions.

An agency's internal scoping summary should carefully and honestly record existing doubts and problems. If water quality in a grazing allotment is declining, the scoping summary should record this trend. The scoping summary should also explain any uncertainties or disagreements about this trend information. A useful technique is to identify who believes what

even if an agency's specialists believe that a certain viewpoint is without merit.

Internal specialists and external constituents perhaps disagree as to the degree of decline in water quality. And they will likely also disagree as to what are the key causes for this decline. Are too many cows the key cause? How important is the current six years of drought conditions? Are wild horses degrading stream conditions and competing with the cows? What technical or scientific studies are relevant as agencies strive to answer such questions?

An honest framing of the problem (a decline in water quality) is the best way for agencies to develop credible evidence that they are making a good-faith effort to analyze all resource conditions.

Such careful and honest scoping information is the best way for the agency decision makers to signal to all interested parties (including the agency's own resource specialists) that the agency will be dealing fairly with all interested parties and their concerns.

2. Establish the applicability of scientific or technical information.

NEPA forecasts are always less than 100 percent certain. Future weather conditions are unknown, and who can know when a wildfire may occur. Even well-documented resource studies often were done on areas with different soils, elevations, and vegetation.

Still, agency specialists must carefully explain how such well-documented resource studies might still apply to the site-specific conditions in the project area. This explanation would be framed something like this:

"The Jones and Smith study (2001, pp. 45-47) looked at growth rates for ponderosa pine in very overgrown, crowded stands. Ponderosa pine in the current project area are not excessively overgrown, but rates calculated by Jones and Smith are still useful because . . ."

Text such as the preceding example is credible because the writer explains the thought process that allowed an agency specialist to use the Jones and Smith study. Readers can clearly understand both what information is being used and why it is applicable to the site-specific conditions being analyzed.

3. Eliminate for well-explained reasons scientific or technical information deemed not applicable.

Agency specialists should explain why certain studies are not applicable. This technique is especially important when an external constituent has asked in scoping comments that an agency address a specific study or resource report.

If the agency decision maker and the specialist decide that this constituent's cited study is not applicable, written records for the project should record their conclusion, along with a rationale. Here is the sort of text that should appear in the record:

"Joe Scrimshaw (the agency fish biologist) and Maria Stonecifer (District Ranger) discussed the Perkins study (1999). Perkins studied fresh-water snail reproduction in high-elevation Great Basin streams, primarily in Nevada. Perkins' conclusions are not applicable to streams in the western Cascade Mountains in Oregon;

rainfall and stream flows are much higher in the Cascades, so reproduction patterns for snails are different.”

Text such as the preceding is credible because it shows that the agency took the constituent’s cited study seriously. In addition, if the project went to court, a judge would have justification for deciding that the agency had adequately addressed the constituent’s cited study.

4. Guard against inappropriate managerial influence on a specialist’s conclusions.

Managerial influence is always a possibility, especially when resource specialists launch a NEPA analysis already knowing what a certain manager wants to do in the project area.

Such prior knowledge is why agencies should do everything they can to guard against inappropriate managerial influence. Recommendations 1, 2, and 3 above are three ways for an agency to guard against inappropriate managerial influence.

Besides these three recommendations, agency specialists should record their environmental forecasts as clearly and as professionally as possible.

For example, a specialist determines that impacts from a projected action would have “minor adverse effects” on recreational success and satisfaction. What happens if the agency’s decision maker believes that these effects would be “moderate and adverse”? Which conclusion should appear in the NEPA Environmental Assessment?

If the specialist and decision maker continue to disagree and both have sound

professional reasons for their viewpoints, then the agency should probably do the following:

- Have both the specialist and the decision maker explain in writing the context and intensity of the impacts leading them to their differing conclusions.
- As appropriate, the decision maker might solicit viewpoints from other agency resource specialists (ones with expertise in this disputed resource). Such responses would become part of the written record.
- The Environmental Assessment (or Environmental Impact Statement) should record the differing viewpoints and briefly explain their sources.
- Then, in the decision document (FONSI or ROD), the decision maker would summarize the disputed conclusion and provide a rationale for the agency’s final judgment as to the likely effects.

The preceding suggestions are one way for a decision maker to avoid inappropriately influencing a specialist’s conclusions.

5. Verify that the final summary information is professionally accurate and complete.

Brief and understandable summary information is a key ingredient in most agency NEPA decisions. Thus agency resource specialists must guarantee that all conclusions summarized are professionally accurate despite their brevity.

This problem—actually a communication problem—is perhaps the best argument for

having an interdisciplinary team review each other's resource reports and associated conclusions. Such reviews are a critical quality control step, but one often overlooked in many NEPA analyses.

Each resource specialist often writes and reviews only his or her own resource report. The team leader (or a writer/editor) then stitches together the various resource reports and the EA or EIS is final. No wonder resource information in an EA or EIS is often uneven, sometimes inconsistent, and only weakly credible.

Review of the final EA or EIS should focus on how clearly each specialist has

captured the full thought process behind conclusions. In particular, as points 2 and 3 above suggest, resource conclusions should clearly rely on the best and most recent resource studies. The resource discussions should also explain why the specialist judged other resource studies as not to be relevant.

The whole NEPA team, therefore, is responsible for making the final EIS or EA (and all supporting documents) a clearly credible disclosure of impacts.

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