Making Decisions Transparent

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Transparent decisions are a legal benefit, especially on environmental questions covered by the National Environmental Policy Act. NEPA case law for over 30 years has called for comprehensible and understandable documents. This emphasis in case law is why transparency in environmental decisions is surely a legal virtue. Transparency is also a political virtue, especially given the public's distrust of government agencies.

Here are some ways for a Federal agency to ensure that its environmental decisions are as transparent as possible:

1. **Remember that environmental decisions are often both complex and subjective.**
2. **Conduct early and ongoing NEPA scoping before making decisions.**
3. **Record fairly and carefully each contributor's views about possible decisions.**
4. **Follow the NEPA process steps as recorded in the CEQ Regulations.**
5. **Ensure that agency documents clearly tell the story behind each decision.**

I was reminded about the benefits of transparency in a National Public Radio report on an environmental case now before the U.S. Supreme Court. The case in question has the U.S. Navy wanting to continue sonar tests off the West Coast. Environmental groups believe that the tests severely injure marine mammals, especially whales. Lower courts have sided with the environmental groups, so the Navy is now asking for the Supreme Court to lift a lower-court injunction on future tests.

The NPR reporter repeated some of the Supreme Court justices' key questions for Navy attorneys. As I heard the questions, almost all of them focused the Navy's decision making process. The justices seemed to have found that details about the Navy's environmental decisions were missing or confusing. In either instance, transparency would have made the justices' legal work easier.

This Navy court case only partially links to NEPA compliance questions. The competing legal positions focus on the power of the Executive Branch to exempt a Federal agency from environmental laws, including NEPA, under an argument based on national security. The following discussion does not attempt to address this main legal problem. Instead, the following discussion focuses on ways to make required NEPA process decisions as transparent as possible.

Language in NEPA does not explicitly mention transparency. But many subsections of NEPA and of the Council on Environmental Quality Regulations direct federal agencies to coordinate their environmental planning with other governmental agencies and with any interested or concerned parties.

Such coordination must surely be as transparent as possible if it is to be both effective and legally compliant. Desirable transparency is the goal of the five suggestions listed above and discussed below.

1. **Remember that environmental decisions are often both complex and subjective.**

Decisions are of two kinds. The one is the major one an agency makes to implement a project. These major decisions are recorded in a Record of Decision (for an EIS), in a Finding of No Significant Impact (for an EA), or in a categorical exclusion. These required decision documents include detailed rationales for decisions. Most major decisions are inherently complex, except perhaps for routine projects as covered by categorical exclusions. Complexity means that such major decisions usually reflect many considerations, ranging from physical and biological effects to the realities of budgets and the political climate.

The second type of decisions are minor ones, including the many analysis choices an agency makes as it moves forward with an environmental analysis. For example, an agency might start a project replacing a collapsed fence on a grazing allotment. As the analysis begins, the agency discovers many things:

- Water quality will improve within the allotment.
- Downstream water users will be affected. They will need to be notified.
- Wildlife access to grazing and escape terrain will decrease.
- Native American sites on the allotment need protection.

Such analysis discoveries signal minor decision points. The agency would need to assign staff specialists to these resource topics and to decide how best to manage (and protect) affected resources. Such minor analysis decisions are eventually integrated into the overall major decision an agency makes to go ahead with a project (as in this case, to replace a collapsed fence).

Complexity of Decisions

The complexity of many environmental questions means that agency decision makers and NEPA practitioners must record their decision process carefully. And such process records should be available to the public, as recommendation 2 below suggests.

Agencies must ensure that all of their project records (either in hard copy or in electronic formats) are as transparent and accessible as possible. Clarity of records is essential.

Not all environmental decisions are complex. Minor, simple decisions are why the NEPA process provides the compliance track of the categorical exclusion. But agencies should remember that short and often minor documents for a categorical exclusion also should be as transparent as possible. Many agencies now require that for projects with possibly sensitive impacts agency files have careful documents supporting the use of a categorical exclusion.

Subjectivity of Decisions

Even a simple decision has its subjective features. For example, in the allotment example above, what if the proposed fence crosses a major antelope migration corridor? How will the potential impacts on antelope influence the final agency (major) decision? Each agency decision maker is likely to have different answers to such questions.

Changing the fence design may mitigate the effects at low cost, but with some impacts remaining. Moving the fence out of the corridor is a more expensive option. How would such answers affect an agency's budget? What about the financial effects on the allotment permit holder?

Subjectivity is obviously a major concern and one that is difficult to record in a transparent fashion. Subjectivity means that no single right answer is likely evident for most environmental projects.

Sometimes, a decision maker even admits that he or she doesn't recall exactly when the final decision became clear. What happened was that chaotic thoughts over days or weeks finally pointed toward a solution. The decision maker usually can't say exactly when that decision point occurred.

Objective decision criteria are sometimes mentioned as desirable, especially because they appear to make decision making transparent. Years ago, some agency decision makers used a process called Choosing by Advantages. The process involved listing all decision criteria and then assigning weighted numerical ratings to each criterion. The process had the look of objectivity, but the numerical ratings ultimately proved to be a legal flaw. Courts naturally wanted to know the rationale for assigning each numerical rating.

So even with its Choosing by Advantages process, an agency's decision process needed to be as transparent as possible as to the rationale for each decision. Agencies eventually abandoned numerical rating schemes as legally unworkable.

With the loss of numerical ratings, agencies have accepted that they need to explain their decisions in language and, perhaps, graphics. So, as imperfect as language and graphics sometimes are, everyday language is the best way for an agency decision maker to record the rationale for the final decision about a project.

2. **Conduct early and ongoing NEPA scoping before making decisions.**

Scoping is the main tool for an agency to use in ensuring transparency. In simplest terms, scoping starts early and continues up to the final major implementation decision. Agencies have also discovered that scoping is both an internal and an external process.

Scoping, as defined in Section 1501.7 of the CEQ Regulations, means that the agency conducts its environmental planning under public scrutiny and with written contributions from any and all interested and affected parties. Section 1501.7(a)1 even mandates that parties involved include "those who might not be in accord with the [proposed]action."

Scoping is only effective if is a transparent effort. An agency's communication with other agencies or the public has to be as clear and as credible as possible. The simplest way for an agency to do this is to tell its analysis story minor decision by minor decision. The story-telling approach means explaining the agency's process decisions, especially its rationale for making each interim decision. (See recommendation 5 below for further information about the story-telling approach.)

Explanatory analysis documents include official notices to the public, informal newsletters, internal emails, written minutes of meetings (both internal and with the public), and internal notes summarizing and explaining comments from the public (see recommendation 3 below). Of course, some of these documents are not available to the public until the agency signs the final decision document. Some may even be exempt from the Freedom of Information Act, as in the instance of written legal advice from agency attorneys.

Strategies for ensuring a transparent process and transparent documents should result in a good faith environmental analysis. The courts often use this faith test in determining if a NEPA analysis has been adequate.

3. **Record fairly and carefully each contributor's views about possible decisions.**

The day you receive the first scoping comment on a proposed action is the day to start recording and responding to comments.

Too often, NEPA team squirrel away scoping comments for weeks or months until they have completed their initial analysis steps. Then they return to the comments, often after they have even finished an internal Draft EIS or an EA. This delay in addressing the substance of scoping comments on a project tells the public that the agency really isn't interested in comments.

Instead, let me propose that NEPA teams answer the following questions when they receive a scoping comment letter or an email from a member of the public (or from another governmental agency).

1. **What are this individual's or the other agency's main concerns or worries about our proposed project?**
2. **How do these concerns link to actions within the proposed project?**
3. **How can we explain our proposed project so that the individual (or agency) better understands our goals and our approach?**
4. **What changes or adjustments can or should we make to our project or to our analysis of the potential impacts?**
5. **What technical terms or concepts related to our project need more down-to-earth explanations?**
6. **What additional information or actions would be appropriate for the individual or agency to contribute to the ongoing analysis effort?**
7. **How should we continue to communicate with these interested parties during the analysis process and before issuing a DEIS or EA for public review?**

These questions should remind NEPA practitioners that scoping comments are an opportunity to refine their project and the steps in their analysis process. The questions imply that agency decision makers should view the NEPA process as an ongoing collaboration between the agency and any interested or affected individuals or groups.

4. Follow the NEPA process steps as recorded in the CEQ Regulations.

Following the NEPA process steps is helpful both to readers familiar with NEPA and to those unfamiliar with NEPA. The NEPA process steps, being predictable, help the NEPA process be as transparent as possible.

For those familiar with NEPA, the process steps are nearly universal across agencies. So readers of a NEPA document (EIS or EA) can easily find information. For example, knowledgeable readers often look first at the end of Chapter 2, where many agencies place a summary of project impacts. This summary is a de facto briefing document for the entire EIS or EA.

Knowledgeable readers also know that each resource topic of interest usually has its own subsections in Chapter 3 and 4 (or a single combined chapter with resource information). So a reader interested in wildlife impacts can turn to the wildlife discussions for a detailed discussion of direct, indirect, and cumulative impacts on wildlife.

Readers unfamiliar with NEPA need to be told that the NEPA process is a typical decision process. And they need to be reassured that the process is actually simple (despite the heavy technical details in some EISs or EAs).

Yes, a NEPA document usually deals with soil impacts, air quality, wildlife and other resource topics that are far from common topics in everyday conversations. But the steps in most NEPA analyses are typical of any decision process. So, if someone decides to buy a new furnace, for example, then they will likely go through the same steps as in a typical NEPA analysis. The basic steps, as applied to the furnace example, are these:

Step 1: The problem to be analyzed.

A furnace has quit or is in bad shape—that is, noisy, leaking, and inefficient.

Step 2: A list of project goals/objectives (a tool for measuring the success of possible decisions).

Choose a furnace with the capacity to heat a house of the specified size

Choose a heating system that is a least 80 percent efficient (based on a not-to-exceed monthly heating cost)

Choose a furnace that is available before cold weather sets in (thus not to be shipped in by slow boat from China)

Step 3: The proposed action and reasonable alternatives

Proposed action: a new furnace

No action: repair the existing furnace

Alternatives: (1) gas fireplaces on each floor; (2) space heaters; (3) in-floor radiant heat; and (4) furnaces from different vendors.

Step 4: Potential impacts of the proposed action and alternatives

Impacts would include physical, biological, economic, and even social effects, as appropriate. Some impacts, such as the cost and possible safety questions, would be the key to a final decision.

Step 5: A final decision on which alternative best addresses the goals and objectives (Step2)

The homeowner chooses a new furnace (or another way to heat the house).

These steps for the furnace example are no different than ones any Federal agency uses in complex NEPA analyses. So a State Department of Transportation dealing with a washed out road starts the NEPA analysis when the washout occurs. Appropriate scoping occurs as early as possible! Next, the DOT determines its goals and objectives. Alternatives focus on practical and the cost effective options. Then potential effects lead to a final DOT decision.

The key in this DOT example and in any NEPA analysis is for the agency to tell its NEPA story as clearly as possible. With clarity, the NEPA process will be as transparent as possible.

5. **Ensure that agency documents clearly tell the story behind each decision.**

NEPA practitioners should be planning, writing, and reviewing all NEPA documents as to their accessibility—that is, their transparency. A recent theme for such efforts has been the reminder for NEPA contributors to remember that they are a story teller first and a technical expert second.

A NEPA story, well told, is or should be the goal of every NEPA practitioner. Attorneys, for example, often complain that the chain of evidence for a conclusion or decision is hard to follow in a NEPA document. What the legal folks are asking for is a transparent decision process!

Here are some suggestions for making your NEPA documents as transparent and as accessible as possible:

1. **Challenge each technical concept and associated terminology. What would be simpler and more down-to-earth ways to explain these concepts and terms?**

2. **Focus content and points on stories (studies and reports) that validate key facts and associated conclusions.** Most listeners/readers find anecdotes convincing. For example, recounting the background of a research study leads directly to comments about the study's credibility and its applicability to current problems or issues.

3. **Encourage readers to contribute to the analysis, both during scoping and by following the logical flow of the analysis process in an EIS or EA.**

4. **Check your evolving text by reading it aloud. Are you appropriately conversational?** Can you get your tongue around a lengthy sentence or a technical phrase? Make your words as simple as possible and your sentences shorter than they ordinarily would be.

5. **Ask a friend or a colleague to review the draft text of a document from the perspective of its transparency.** Ask the reviewer to answer one or both of the following questions. Would an average lay person or students in the 7th grade understand the concepts? Would they find the technical concepts and agency conclusions reasonable?

For additional discussion of the preceding suggestions, see the January 2007 Shipley E-news for an article on "Telling a NEPA Story." This article is one of series of newsletter articles that discusses techniques for recording NEPA information. To access the E-news archive, go to: http://www.shipleygroup.com/environmental/index.html?pg=news.