

Are Private Contractors Making Major Governmental Decisions?

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National Public Radio (NPR) recently reported that in 2007 the Federal government spent nearly \$450 billion on contracts with private industry. NPR's key question was essentially this: Are private contractors making major policy decisions; ones that government employees should be making?

The short answer seems to be that contractors are at times making all sorts of decisions, including ones that influence major Federal policies.

The two broadcasts on December 1 and 2, 2008 cited private contract work for agencies as diverse as the Internal Revenue Service and the Center for Disease Control. (The two broadcasts are available on the NPR archives at <http://www.npr.org/templates/story/story.php?storyId=97322339>)

The NPR question above is relevant to us (in the NEPA/environmental world) when Federal agencies use contractors to perform tasks under National Environmental Policy Act (NEPA) procedures. NEPA decisions routinely guide how the government manages thousands of Federal facilities and millions of acres of Federal land and the resources on and under the land. These decisions, as analyzed under NEPA, affect public health, safety, and the public's economic well-being.

The NPR broadcasts also mentioned that Federal employees work as public servants because they swear, when hired, to defend the U.S. Constitution. In contrast, a contractor's primary goal is naturally corporate profit, not necessarily public service.

The following discusses a governmental agency's legal responsibility for major NEPA decisions and for the analysis steps leading to such decisions, and makes the following recommendations:

1. **Distinguish between major NEPA decisions, which contractors should not make, and minor ones, which they can and often do make.**
2. **Be sure that the Statement of Work for a NEPA task clearly lays out a contractor's roles and responsibilities.**
3. **Use the "hard look" legal test to guide NEPA analyses, especially tasks assigned to contractors.**
4. **Record carefully all information relevant to an agency's NEPA decisions, including information from private contractors.**
5. **Use carefully written, transparent decision documents to record the trade-offs in an agency's NEPA decision.**

The preceding five recommendations expand on similar ones made in an earlier Shipley newsletter, ([Volume 50, published in April 2006](#)). In that newsletter's lead article I suggested that contracting an entire NEPA process was unwise. I also suggested that outside contracting was often more expensive than when agency employees completed NEPA tasks themselves.

I continue to believe that agencies should not routinely make a contractor responsible for all phases of a NEPA analysis.

Cost estimates for contractor tasks should include the hours spent by agency employees monitoring a contractor's performance. Other costs also are relevant. For example, agency employees frequently find themselves rewriting key NEPA documents when a contractor's draft documents turn out to be thin or legally questionable.

The final NEPA bill is the contractor's total bill, plus all internal agency hours/days spent preparing the SOW and tracking each step of the contractor's performance. Many agencies find that they have to appoint a shadow internal team to monitor each step of the NEPA analysis process. Such an internal team might spend days or weeks assisting a contractor.

1. Distinguish between major NEPA decisions, which contractors should not make, and minor ones, which they can and often do make.

Major decisions are ones that influence governmental actions. For example, if a contractor writes up the purpose and need for an agency action, that action can be and often is implemented as described in the contractor's initial draft. Agency decision makers do legally retain authority for the agency's final choice of an action, but this authority may be distorted by the contractor's initial draft of the purpose and need. By the time the agency recognizes a problem, the agency may have paid a contractor thousands of dollars to analyze resource impacts arising from the scope of the initial purpose and need.

Consider another NEPA example when a contractor influences the scope and intent of an agency's action. Under NEPA, agencies must look at a range of reasonable actions, but this legal requirement is not clear. So, if a contractor chooses to analyze only limited range of alternatives, agency decision makers will be reviewing only limited options. An agency decision maker will need to choose an alternative fully analyzed as to its potential effects on the human environment. Choosing an unanalyzed alternative would mean a delay in a project of months or years, as additional NEPA analysis occurs. So a contractor's early choices as to which alternatives to analyze may have a substantial effect on the final agency decision.

What are major NEPA decisions? The following list includes some of the most important ones. Such tasks (or decision points) are properly an agency's responsibility. Contractors can and often do work up information related to these major tasks, and they brief agency decision makers on such tasks. Agencies, however, should be careful not to let contractors make major decisions about concerns and questions to be covered or to be excluded.

Governmental employees properly retain final legal responsibility for the adequacy of all NEPA analysis information, especially any contractor-provided information. This legal responsibility is important when agencies ask a contractor to work on any of the following major NEPA decision points.

Major NEPA Decisions

- 1. Identifying and writing the purpose and need for agency action, especially its links to the agency's legal mission.**
- 2. Describing a detailed proposed action and assessing its potential for resource risk and public controversy.**
- 3. Evaluating and prioritizing scoping information for inclusion in analysis tasks 1 and 2 (listed above).**
- 4. Developing a range of reasonable alternatives, based on the written purpose and need and associated scoping information.**

5. **Setting quality standards for a legally adequate effects analysis.**
6. **Choosing the proposed action or an alternative to the proposed action and preparing a transparent decision document for the chosen action.**
7. **Allocating funds for activities that support both internal and external (contractual) tasks included in the chosen decision (step 6).**

Minor NEPA analysis tasks include any of the supporting tasks required for a full analysis of potential effects. Minor analysis tasks support one or more of the seven major decisions listed above. A contractor properly can work on such minor tasks, always with the assumption that agency staff will review a contractor's work as to its adequacy.

Some examples of minor NEPA tasks are these:

- Sampling water in a stream and writing a report profiling water quality findings
- Survey and samples of soils in a project area
- Engineering analysis of a building and its structural features
- Literature search for habitat requirements for a wildlife species
- Application of cultural resource standards to a newly identified cultural site
- Excavation of an archeological site and properly handling all artifacts found
- Preparation of written documentation of the excavation activities (in the prior listed task)

Note that each of the preceding tasks is limited as to its scope. These limitations mean that agency employees are retaining final authority for substantive NEPA policy decisions relating to management of the resources affected.

A further advantage of limited tasks is that a Statement of Work (SOW) can focus on smaller tasks. Such a focused SOW is easier to write and easier to monitor in regard to contractor performance.

2. Be sure that the Statement of Work for a NEPA task clearly lays out a contractor's roles and responsibilities.

An agency's Statement of Work for NEPA tasks is the key to making a contractor aware of and responsible for certain NEPA tasks and not for other tasks.

Early and ongoing reviews of a contractor's work are critical. Without such reviews, a contractor begins to make decisions that influence later steps in the NEPA process. The legal integrity of the NEPA process may even be compromised in extreme instances.

The Forest Service was clearly worried about such NEPA problems when it published in 2004 a list of recommended NEPA checkpoints for decision makers. The Forest Service checkpoints parallel the seven major NEPA decisions listed above under recommendation 1.

Why did the Forest Service publish its list of NEPA checkpoints? A primary concern seems to have been that even internal NEPA processes can go off track, ultimately compromising or delaying a final Forest Service decision on a proposed action.

Contractor-conducted NEPA analyses can complicate analysis problems. An agency employee is the technical representative who meets with the contractor. When necessary, a decision maker is brought in if a contractor is having difficulty meeting agency expectations. Such an intervention is frequently too late, especially if the contractor has already spent thousands of dollars surveying resources and preparing reports.

As one remedy for such analysis problems, the Forest Service has mandated that decision makers should review and approve (preferably in writing) each of the steps listed in their agency NEPA guidance. The intent of such internal reviews appears to have been that they occur early and throughout the NEPA process.

These reviews should include NEPA analysis tasks from both agency employees and outside contractors.

3. Use the “hard look” legal test to guide NEPA analyses, especially tasks assigned to contractors.

Sound, credible NEPA analyses don’t just happen. Agency decision makers and NEPA contributors must ensure that an agency’s NEPA process takes the legal “hard look” at potential impacts.

NEPA contributors include both agency employees and outside contractors. Agency decision makers must guarantee that information from all contributors meets the full legal intent of the NEPA statute—that is, the “hard look” standard, as it has developed over the last four decades of NEPA case law decisions.

The “hard look” test is an important one because it says that the agency is responsible for taking an appropriately detailed look at possible impacts. Anything less is inadequate. Notice that the “hard look” test does not reflect a single stated scientific standard. Instead, the courts rely on each agency to decide, in light of project scoping, that a certain level of resource analysis is an appropriate hard look.

In *E.I. DuPont de Nemours & Co. v. Train*, the District Court explained what “hard look” means (541 F.2d 1018, 1038 (4th Cir. 1976)). Text from this court decision translates to the following action items for every NEPA analysis:

- 1. Spell out assumptions.**
- 2. Explain inconsistencies.**
- 3. Disclose methodologies.**
- 4. Explain and resolve contradictory evidence.**
- 5. Explain referenced information carefully.**
- 6. Explain points so clearly that readers don’t have to guess about their meaning.**
- 7. Support conclusions so that judicial readers can understand technical points being made.**

These seven suggestions are de facto review criteria for any NEPA analysis, especially when contractors are submitting NEPA information. I discussed similar criteria in the Shipley Group newsletter [No. 55](#) (June 2007). That newsletter emphasized the best-science criterion and the cited examples in that newsletter show NEPA writers how to make their written reports meet the “hard look” legal mandate.

“Hard look” complements the “good faith” legal test, which is also a common test that the courts use to test NEPA procedures. Both tests are not technical or scientific. Instead, they both require agencies to adjust each NEPA analysis to project conditions. A simple project requires basic NEPA, perhaps a short categorical exclusion file. A more complex project requires a more complex analysis process, usually an EA or an EIS.

The resulting NEPA documents, including decision records, should be written so that common readers (the public and the courts) can understand technical or scientific points being made. See recommendations 4 and 5 below.

4. Record carefully all information relevant to an agency's NEPA decisions, including information from private contractors.

Good record keeping is essential to the procedure-focused NEPA process. The relevant legal principle is that if something discussed is not recorded, then it does not exist. In NEPA litigation, Federal courts rely on written records, not extensive court testimony.

Written records from contractors are especially important. A good Statement of Work, as discussed above under recommendation 2, should specify key written deliverables from the ongoing NEPA analysis. Such deliverables become part of the legal record that the agency eventually compiles to validate its NEPA process.

What sort of NEPA records should a contractor submit? Two checklists are relevant to an answer. The one checklist is the list of seven major NEPA decisions, as listed above under recommendation 1. Contractors should not be solely responsible for these major NEPA decisions, but their staff work and investigations related to the seven major decisions are properly part of the legal record documenting the agency's decision process.

Contractors should be especially careful to record any analysis recommendations they choose to make. For example, if a contractor suggests an additional alternative, such a suggestion should be part of the legal record. After all, information about alternatives suggested helps validate that the agency looked at a range of reasonable alternatives.

The second checklist follows the seven "hard look" points, as listed under recommendation 3. This checklist is important because it helps an agency and its contractors prove that the recorded process took a hard look at possible impacts.

A contractor should routinely be responsible for a secondary deliverable related to any impact findings. For example, if a contractor finds that the soils in the project area are highly erodible, the written record should show exactly how the contractor's employees arrived at this finding. Such an explanation is essentially a separate discussion on data adequacy for each impact topic of relevance to the NEPA analysis.

Most agency NEPA teams (and their contractors) fail to address data adequacy. This omission is a legal problem if a NEPA process winds up in litigation.

5. Use carefully written, transparent decision documents to record the trade-offs in an agency's NEPA decision.

NEPA's main decision documents are a Record of Decision (for an EIS) and a Finding of No Significant Impact (for an EA). Although having somewhat different legal roles, both decision documents recount an agency's NEPA story leading to an agency's selected alternative. Most importantly, a good decision document clearly weighs the tradeoffs within the agency's selected alternative.

Tradeoffs are inevitable except for the most routine of decisions. A decision maker, for example, might balance the cost of the project against the agency's available budget and against the potential for impacts on air, water, or visual quality. The final decision might forecast some adverse impacts that would be too costly to eliminate. Remember, projected minor adverse impacts would not violate NEPA unless the agency fails to disclose them. More severe adverse impacts would be an illegal choice if they would possibly violate substantive Federal laws, such as the Clean Air Act or the Clean Water Act.

If properly written, a NEPA decision document discusses tradeoffs honestly and clearly. Competing viewpoints are the key because, as noted above, tradeoffs are inevitable. A good decision document describes each interested party's views (as discovered during an agency's

internal and external scoping) and lays out the decision maker's rationale for choosing reasonable options within the proposed action or an alternative.

A transparent decision document clearly records its NEPA story—both honestly and with a readable writing style. The legal test of comprehensibility means that lay readers, including members of the public and the judge, can easily understand what the agency has done during its project planning. The actual legal tests are (1) whether the agency has looked at all potential impacts and (2) whether the agency has honestly disclosed those impacts to all interested and affected parties. See the discussion of the “hard look” standard above in recommendation 3. A transparent document must be highly readable.

Accurate technical content is inadequate if the writing style of the document is not readable. Here are some suggestions for achieving a readable writing style:

1. **Challenge each technical concept and associated terminology. What would be simpler and more down-to-earth ways to explain these concepts and terms? Review the evolving text early and frequently!**
2. **Focus content points on stories (that is, studies and reports) that validate key facts and associated conclusions. Most readers find anecdotes convincing. Writers should take the time to explain the relevance of a study or the applicability of a report. Such explanations are essential to the telling of a good NEPA story.**
3. **Encourage readers to contribute to the analysis, both by submitting information during the NEPA analysis and by following the logical flow of written information 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?**
5. **Ask a friend or a colleague to review the draft text from the perspective of its readability. Ask a reviewer to answer one or both of the following questions. Would average lay people (or students in the 7th grade) understand the concepts? Would they find the agency conclusions reasonable?**

Notice the emphasis on review in these five suggestions. No NEPA writer has the eyes or ears for discovering when his or her own writing is likely to baffle or annoy a lay reader. So NEPA practitioners should always make time for early and frequent reviews of the evolving draft text. Reviewers should include colleagues, managers, legal staff, and even members of the public (if legally possible).

Early and frequent reviews are a major quality- assurance step. Shipley Group writing workshops routinely suggest that NEPA practitioners build careful reviews into their NEPA analyses.

A Final Challenge: Choose a recent agency decision document (or optionally, the impacts chapter from an EIS or EA). For the chosen sample, answer the following questions:

- **How readable and understandable is the text?**
- **How timely and how useful were the scheduled reviews?**
- **Were reviews done early enough (thus heading off early mistakes)?**
- **Were reviewers' suggestions useful and practical?**
- **Did scheduled reviews help the agency complete the document on schedule and with the desired quality?**

Shipley Group NEPA workshops routinely address the preceding suggestions for keeping NEPA documents clear, readable, and legally defensible.

Earlier in this newsletter I referred to the Shipley archive of newsletters. That archive (<http://www.shipleygroup.com/environmental/index.html?pg=news>) includes newsletter articles devoted to one or more of the previous suggestions.