

NEPA Retrospective

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This National Environmental Policy Act (NEPA) retrospective is based on my 30 years of working in NEPA compliance for a Federal land management agency. It critiques the NEPA compliance process as currently practiced and profiles the role of an agency's environmental coordinator. This guest article does not represent the views of the Shipley Group or of any Federal agency, but it provides my personal observations about the intricacies of NEPA compliance.

Between a Rock and a Hard Spot

A primary job of environmental coordinators is quality control, which places them between a rock and a hard spot. **The Rock:** Environmental coordinators try to do a reasonable job of quality control for a NEPA document based on (1) public, political, and managerial interests and sensitivities and (2) the potential environmental impacts of the proposed action. If environmental coordinators are too exacting, they can get internal flack about "overkill" - doing too good of a job, because it is quickly time to move on to the next priority project. **The Hard Spot:** If an agency is appealed on a NEPA document, the environmental coordinator can get internal flack about why they didn't do a better quality job on the NEPA document.

Too Much of a Good Thing

NEPA compliance must be procedurally correct and legally sufficient. If not, we have failed. Perfecting a NEPA document, however, is not a worthwhile goal. The point of diminishing returns is reached before perfection is achieved. There is a point when the NEPA document is "good enough." The courts do not expect perfection. This does not mean that a poor job is acceptable. The document, among other things, must be (1) understandable, (2) analytically sound, (3) reasonable, (4) a clear record of an informed decision, (5) a clear tracking of legally required elements, (6) an appropriate consideration of public inputs, and (7) a consistent record of a hard look and a good faith compliance effort.

Ivory Tower NEPA vs. Trench Warfare

It is essential that environmental coordinators be tutored in, and understand, the CEQ Regulations and Agency requirements for NEPA compliance. Note, however, that an "Ivory Tower" version of NEPA compliance may not take into account factors which impact the NEPA process: (1) tight deadlines, (2) competing projects for everyone's limited time, (3) poor writing abilities and/or potentially bad attitudes on the part of some ID Team members, (4) human frailties and egos, (5) political pressures and (6) overzealous managers. While environmental coordinators need to comprehend the ideal version of NEPA compliance, this ideal version is different from NEPA compliance in the world of NEPA trench warfare.

Everybody Is a NEPA Expert

I wish I knew as much about NEPA compliance as some folks think they do. Some people are high on the learning curve in regard to NEPA compliance, but if anyone (including an environmental coordinator) claims to be a “NEPA expert,” never trust that person again. There is much to learn and there are many moving targets.

An EA is Not a Mini EIS

An EA and an EIS are different animals and should not be allowed to interbreed. They serve different purposes, even though they both provide for an informed decision. An EA serves to substantiate that significant impacts would not occur. An EIS acknowledges that significant impacts would occur and follows a prescribed process of analysis and public involvement.

Procedural vs. Substantial

If an agency is procedurally correct in completing an EIS they will likely prevail upon an appeal. If an agency is procedurally correct in completing an EA, there is no guarantee that they will prevail on an appeal. An EA has the additional substantive requirement of demonstrating a lack of significant projected impacts.

NEPA Version of Kryptonite

An enlightened challenge to an EA level of analysis is the NEPA version of Superman’s kryptonite. This is because the EA level analysis has the additional substantive requirement of demonstrating a lack of significance. It can be extremely difficult to “prove a negative” . . . to be able to conclude that something will not happen, (i.e., that none of the determinates of significance could possibly occur) and do it in 10 - 15 pages. Authors of EAs need to understand that no matter how good the EA level of analysis is, they could still lose to an enlightened appeal.

Good Intentions

We live and die by the administrative record for the NEPA document. The road to losing an appeal is filled with good intentions, which are rarely included in the administrative record.

Not All Black and White

Many portions of NEPA compliance are shades of gray. That is what makes NEPA compliance so interesting. The correct answer for NEPA compliance depends on the facts in each case. NEPA compliance must fall back on, and be grounded in, the “Rule of Reason” . . . “Taking a Hard Look” . . . and making a “Good Faith Effort.” These concepts are the basis for legal challenges to NEPA documents.

NEPA Reflects Democracy

The NEPA process, like democracy, can be messy, cumbersome, time consuming, and inefficient, but it allows for consideration of all points of view and results in an informed decision. Promoting NEPA efficiencies is a worthwhile goal, but expediting the process to the detriment of being procedurally correct and legally sufficient is a losing proposition.

Outside Threats Can Make You Stronger

The quality of NEPA compliance is directly related to the threat of appeal from an outside party. I did what I could for many years to improve the quality of NEPA compliance, with some successes. The biggest improvements, however, occurred when an environmental organization put my agency on notice that every NEPA document produced would be appealed. I could kiss their feet.

“NEPA Compliance for Dummies” Is Not an Option

NEPA compliance is complicated. NEPA compliance is a complicated and iterative process that can boggle the mind. Plus, the bar keeps getting raised through court decisions, agency policy, better and/or conflicting science, public expectations, and the increased sophistication of potential appellants.

Dumb it Down

This is not meant to be disrespectful to the public readers of NEPA documents. NEPA documents are required to be written in plain language. Over the years I have advised NEPA contractors who have an impressive array of PhDs on their ID Teams that they were missing an essential member of their team – an eighth grader who can review the document for understanding. It is somewhere between difficult and impossible for a lot of highly educated specialists to “dumb it down,” but this can be critical for public understanding.

Resource Specialists Can Be More Sensitive than Their Resources

The ecosystem can be surprisingly resilient. Resource specialists are paid to look out for the welfare of their resource, but there are instances when the resource specialists are more sensitive to projected impacts than the resource they are overseeing. Resource specialists should take a longer term view of impacts—that is, resource conditions following rehabilitation and recovery.

Impacts Are A-OK

There is nothing wrong with having impacts. An author of an EA level of analysis has the tendency to “low-ball” the potential impacts. No need. There can be plenty of adverse impacts without reaching significance as defined by CEQ, and requiring an EIS. But impacts need to be disclosed so that the approving official can make an informed decision based on an adequate impact analysis and make a “look before you leap” decision.

Crying in Your Beer

If an ID Team resource specialist bemoans potential impacts to their resource, the question to ask them is whether they have suggested changes to the proposed action or proposed mitigations. Such suggestions during the NEPA analysis should lessen or eliminate undesirable impacts. If they didn't make such suggestions, then they have failed their resource and you should take away their beer.

Don't Ask; Don't Tell

Follow-up project monitoring in order to determine whether impacts were accurately predicted in the NEPA document – will never occur to the extent it should. While it should be encouraged, there just isn't enough time or money . . . agencies are forced to move on to the next priority project. "Don't ask – don't tell" is generally the most pragmatic approach to project NEPA monitoring.

Start with the End in Mind When Writing an EA

A primary purpose of an EA level of analysis is for an approving official to determine whether a Finding of No Significant Impact can be signed. The EA should, therefore, be written with the end in mind, with one eye on the determinates of significance as defined by CEQ. Is this pre-decisional? No. A decision must have been made "up-front" that impacts were not expected to be significant in order to begin the EA level of analysis. That a FONSI cannot be signed based on discoveries in an EA is a perfectly legitimate finding as an outcome of an EA level of analysis.

Contracting

Unfortunately, any schmuck can bill themselves as a NEPA contractor (see section above on "Everybody is a NEPA Expert"). There is a wide variety of quality out there. Follow Indiana Jones's example and . . . "choose wisely." Since contractors also can be overcommitted, once selected, some NEPA Contractors will do what they can to get the agency to do the work that they have been contracted to do. The contractor's responsibilities for a NEPA compliance effort must be based on a thoughtful and detailed Statement of Work.

Give and Take

When a NEPA compliance effort and document are contracted, it is not possible for an agency to write a perfect Statement of Work, which will cover all eventualities. Nor is it possible for the contractor to write a perfect proposal, which will cover all eventualities. It is to be expected that there will be a give and take and some adjustment of work and budget throughout a contracted NEPA compliance process.

NEPA Specialists Make Excellent Scapegoats

Some agency managers just have to blame somebody as a consequence of their incessant effort to get as much done as possible in as little time as possible, their political inability to say “no” to additional work, and their decision to take risks in NEPA compliance. That’s why it is important to CYA and document, document, document!

Put the Approving Official on the Spot

Put the approving official on the spot to make the necessary initial decisions during internal scoping to guide the development of a NEPA document including such direction as (1) who should be contacted during external scoping? (2) what are the issues? (3) what alternatives are needed for the NEPA analysis? (4) what is the schedule for completion? And, (5) who is assigned to be on the ID Team? Be certain to document the results of these internal scoping questions—that is, CYA.

Conclusion

Over the years spent navigating the mental gymnastics of NEPA compliance, I have seen repeatedly how agency efforts result in better decisions on the ground and thus meet the basic purpose of NEPA.