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# Valid Editorial Suggestions vs. Fussbudgetry

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Writers often have to decide whether suggested editorial changes are valid. Valid suggestions help writers replace wrong words and revise misleading phrases. After all, a reviewer's thoughtful suggestions often help even the best of writers avoid such errors.

The following newsletter discusses valid editorial suggestions for National Environmental Policy Act (NEPA) documents. Such documents require text that is consistent with legal or regulatory meanings. Here are a few suggestions for maintaining legal and regulatory consistency:

1. **Be careful to quote and to discuss legal or regulatory language accurately.**
2. **In NEPA analyses with multiple agency contributors, rely on an approach using cooperation, not coordination or collaboration.**
3. **List and carefully analyze relevant mitigations, being aware of their potentially negative implications.**
4. **In a NEPA Environmental Assessment (EA), establish a clear context and an intensity level for all impacts of concern and quantify impacts whenever possible. Place impact discussions of significance or insignificance in the agency's Finding of No Significant Impact (FONSI).**

The preceding four suggestions are valid ones for reviewers to use in assessing the content of NEPA documents. NEPA writers should take such suggestions seriously, rewriting and revising their language appropriately.

Unfortunately, NEPA reviewers sometimes make editorial suggestions that are incorrect or unnecessary. Such mistaken editorial comments are examples of fussbudgetry.

**Fussbudgetry**, for those unfamiliar with the term, is nervous fretting over minor, often imaginary problems. As applied to documents, an editorial fussbudget would likely "correct" the following sentences:

1. The tax proposal required all taxpayers to carefully list new deductions on IRS Form XXX.
2. The new chancellor had a PhD from the University of Utah.
3. The District Manager told us to go slow in changing the frequency of field monitoring surveys.

What editorial corrections would a fussbudget make?

- In **sentence 1**, one edit would be to move "carefully" after the verb--thus making the phrase read "to list carefully." This edit corrects the assumed error of the split infinitive. But even today's conservative editors admit that a split infinitive is not an error and surely not one requiring a mandatory rewriting.
- In **sentence 2**, one edit would make Ph.D. the correct abbreviation. Many abbreviations, including academic degrees, have begun to lose their periods in recent decades—for example, BA for Bachelor of Arts or USU for Utah State University. Both Ph.D. and PhD are acceptable, with the choice being a writer's editorial preference.
- In **sentence 3**, one suggested edit would replace "slow" with "slowly." Centuries ago in English, "slow" served as both adjective and adverb. Over time, the adverbial spelling "slowly" developed to compete with "slow." "Slow" is a correct choice in sentence 3 even though the growing preference for "slowly" is a possible rephrasing. Both versions are correct. Compare, for example, the common road sign: "Go Slow."

As the preceding three examples illustrate, writers and their editors should not waste time on minor or imaginary problems. A good rule of thumb is that reviewers should not change text to match their personal writing preferences unless such editorial changes link to changes in content with legal or regulatory implications.

Go to your computer's search software for handy guidance on questions about language and stylistic choices. You may need to experiment with the terms in your search phrase, but keep trying. If you want a published reference book, a good one is Bryan A Garner's *A Dictionary of Modern American Usage* (New York, Oxford University Press, 1998). Garner answers hundreds of questions about current usage patterns in today's American English. Garner's text is also available online (for a subscription) at the Oxford University website.

The following four discussion topics highlight editorial choices that have legal and regulatory implications for NEPA documents, not minor stylistic choices. NEPA writers ignore such legal and regulatory implications at their hazard.

## 1. Be careful to quote and to discuss legal or regulatory language accurately.

Nearly 30 years ago, a Shipley colleague and I met with several senior managers within the U.S. Department of Interior. One of these managers—an experienced legal counsel—observed that field documents complying with NEPA often failed to list the laws authorizing an agency's actions. At that time, I did not understand the reasons for his observation.

I now believe that this legal counsel was suggesting that non-agency readers often didn't understand why a federal agency had a legal reason to initiate an action. The agency's legal credibility in proposing an action was unclear. The counsel felt that a federal agency needed to

answer two basic questions--**Why is the agency proposing an agency action here?** and **Why propose this action now?** (Consider how many of today's public comments assert that many Federal actions are unjustified and a waste of funds.)

The preceding bolded questions are the basis for a clear Purpose and Need statement in NEPA's recommended Chapter 1 for an EA or an EIS. And to be as credible as possible, a sound Purpose and Need includes reference to legal authorities for the proposed agency actions. Here, then, in Chapter 1 of an EA or EIS is where NEPA practitioners should provide a clear and credible reason for the agency's actions and for the needed federal funds.

Remember that NEPA's Purpose and Need is best viewed as an on-the-ground problem with measurable project objectives. So, for example, the Yellowstone National Park might propose to restore an access road destroyed by an avalanche. Here then is a need for immediate action, perhaps even emergency actions. A NEPA analysis would necessarily address such an action, being guided by an objective: "Provide safe and convenient access on the damaged road, meeting the relevant highway construction standards for the projected level of traffic." Along with this objective, a Yellowstone Park EA would cite, as appropriate, the Yellowstone Park mission, relevant National Park Service regulations, and Federal Highway Administration road construction standards.

Remember that NEPA's stated Purpose and Need in an EA or EIS does not address the need for a NEPA document. Its focus is on legally driven site-specific problems that create a resource needs. In the above case, the need is the loss of access on a major Yellowstone Park road due to a natural disaster. For more information about the writing of a Purpose and Need section, see Shipley Group newsletters 76 (October 2010) and 51 (June 2006).
http://www.shipleygroup.com/environmental/index.html?pg=news

As the listed heading above states, I now suggest that agency documents cite their legal and regulatory authorities, beginning in Chapter 1 of an EA or EIS. And as a corollary to this recommendation, agency writers should actually quote relevant statutory language. At a minimum, field documents should quote relevant words and phrases from laws and regulations. Sketchy summaries and inaccurate paraphrases are not adequate. Statutory words and phrases have a legal role; words in a summary or paraphrase do not have the same legal force.

Let me mention two short NEPA examples. The first example is the phrase "unresolved conflicts concerning alternative uses of resources" (NEPA, Section 102(2)(E)). The preceding quote establishes a mandate that an agency shall "study, develop, and describe appropriate alternatives" when "unresolved conflicts" exist. The statute does not explain its language very clearly, so NEPA practitioners have to interpret each proposal to determine if applicable "unresolved conflicts" exist. How better to make such a determination than discussing the relevance and the possible meanings of what "unresolved conflicts" in Section 102(2)(E) means?

The second example is the definition of a cumulative impact in Section 1508.7 of the Council on Environmental Quality (CEQ) Regulations. The CEQ's Regulations are the best source for a definition of a cumulative impact. (NEPA does not mention cumulative impacts, but the CEQ Regulations do and the Regulations have the force of law.) NEPA practitioners who suspect that a cumulative impact might exist for a project should start with a careful quoting of key phrases from the CEQ definition and follow by applying the definition to site- specific project conditions.

Agencies should always establish clear legal mandates (purposes) when they launch a NEPA analysis. And they should continue to do so as they analyze alternatives (the "unresolved conflicts" in NEPA statute language). Similarly, NEPA statutory language and CEQ regulatory language are the legal reasons why an agency addresses all potential impacts, including those that are perhaps cumulative.

## 2. In NEPA analyses with multiple agency contributors, rely on an approach using cooperation, not coordination or collaboration.

Lead and cooperating governmental agencies have well established roles under NEPA and the CEQ Regulations. See, for example, Sections 1501.5 and 1501.6 of the CEQ Regulations. Also, the Bureau of Land Management in 2005 published *A Desk Guide to Cooperating Agency Relationships*. This *Desk Guide* is the best and most recent explanation of the roles of cooperating agencies (including other Federal agencies, State agencies, local governments, and Native American Tribes).

To repeat, Federal agencies should continue to include cooperating agencies in their NEPA analyses. All governmental units and even the courts understand and work within the cooperating agency framework.

As suggestion 2 states, governmental units (especially counties or local communities) should not introduce a new and undefined legal relationship. But this is what some counties have begun to discuss. This rather new initiative speaks about the need for Federal agencies to coordinate their planning efforts with States, counties, and even local communities.

This initiatives supporting coordination goes back to statute language in The Federal Land Policy and Management Act (FLPMA) of 1976. Section 202(c)(9) of FLPMA states that the Secretary [of Interior] shall ". . . to the extent consistent with the laws governing the administration of public lands, coordinate . . . with the land use planning and management programs of other Federal departments and agencies and of the States and local governments. . . ." Then Subsection (9) ends with this statement: "Land use plans of the Secretary under this section shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of the Act."

Language similar to FLPMA guidance appears in other Federal laws. But the other references to coordination are not even as clear as the one in the preceding paragraph. Notice that even the FLPMA language from Section 202(c)(9) provides no specific procedures or requirements that would serve to give coordination efforts legal power. Instead, the phrasing gives the Secretary of Interior discretion as to what is or is not to be included in coordination activities.

The weak statutory FLMPA language is why the Shipley Group recommends that all governmental agencies rely on the well-established cooperating agency roles under NEPA. Yes, sometimes a lead agency doesn't work well with cooperating agencies, but such problems would also occur under either coordination or even collaboration.

This discussion of "cooperation" vs. "coordination" is an illustration that statute language is a crucial tool in deciding what legal mandates are applicable to questions of Federal law. As I state above, always return to the original statute language, not to inaccurate summaries or fuzzy paraphrases.

For more information about cooperating agencies, coordination, and proposed collaboration roles, see Shipley Group newsletters 67 (August 2009) and 68 (October 2009).

### 3. List and carefully analyze relevant mitigations, being aware of their potentially negative implications.

Mitigations, as defined in CEQ Regulations, Section 1508.20, are five strategies for avoiding, minimizing, rectifying/reducing, or compensating for unwanted impacts.

Recent discussions of the word "mitigation" have highlighted the linkage between mitigations and impacts that may be undesirable, perhaps greatly so. Such discussions begin with questions about whether an agency will implement and enforce the mitigations listed in NEPA documents. Next come questions about the effectiveness of mitigations even if implemented. Finally, reviewers (including even Federal judges) often ask agencies for monitoring data showing that mitigations have a record of success. (**Note:** Such questions are some of the main ones causing agency EAs to become lengthy. After all, a defensible EA would have to answer all of the preceding questions clearly and credibly.)

The preceding multiple questions show why a reader of a NEPA EA might be troubled by pages of listed mitigations. The mere listing of many mitigations implies that possible impacts might be severe. Conceptually, the residual impacts (those remaining after the implementation of all mitigations) are enough of a concern to raise doubts about whether the estimated impacts could exceed the threshold of possible significance.

This political role of the word "mitigation" has led agencies to make the following adjustments to their lists of mitigations. These adjustments are ones I suggest when workshop participants ask about how to list and discuss mitigations in an EA.

1. Save the word "mitigation" for legally based project-specific requirements—for example, ones linked to and required from Section 7 consultation with the US Fish and Wildlife Service or with National Marine Fisheries Service. A second example would be Section 106 consultation on cultural resource impacts, when the SHPO requests one or more project-specific mitigations. Any other crucial project-specific mitigations retain the label of a mitigation. For example, assume a local hunting organization negotiates some habitat enhancement provisions; then these provisions would be tracked as a project-specific mitigation.
2. Discuss most routine project activities (as included in the action alternatives) as design requirements or project features. Many such project requirements are, strictly speaking, mitigations, but avoid using the mitigation label for design requirements or project features.
3. List Best Management Practices and explain their relevance to one or all of the action alternatives. Again, avoid calling them mitigation measures. This list of Best Management Practices might appear in the standard NEPA Chapter 2: Alternatives, or more likely, in an appendix.
4. As with design requirements, list project adjustments negotiated with an external proponent as features of the proponent's submitted Plan of Operation. Again, avoid using the term "mitigation" for such negotiated project features.
5. In cases where an external proponent submits a Plan of Operation, most agencies call the submitted Plan the NEPA Proposed Action. Then, the agency often arrives at another action alternative, often called the Proposed Action plus Mitigations/Modifications. This Proposed Action Modified is usually the agency's Preferred Alternative.

Mitigations have been a contentious topic ever since the first NEPA documents in the early 1970's. Agency managers wanted to keep mitigations optional, thus cutting project costs and monitoring efforts. (Mitigations, if chosen by an agency, are legal commitments and require full funding.) Environmental groups wanted strong mitigations and guarantees that the agency would implement the mitigations. Early court decisions dealing with mitigation-dependent FONSIs were mixed; some appeal circuits accepted mitigated FONSIs, but other circuits were skeptical that mitigation measures would ensure impacts that were minimal and clearly not significant.

**4. In a NEPA Environmental Assessment (EA), establish a clear context and an intensity level for all impacts of concern and quantify impacts whenever possible. Place impact discussions of significance or insignificance in the agency's Finding of No Significant Impact (FONSI).**

The two sentences in suggestion 4 are a good summary of current agency practices dealing with the legally sensitive NEPA term "significance."

A Shipley colleague, however, recently asked me if keeping discussions of significance out of an EA didn't evade the responsibility for clear disclosure of substantive impact information in an EA. Some years ago I had an Air Force legal counsel suggest much the same thing about impact analyses in an EA. Such suggestions are understandable and, if followed, would likely not legally doom an EA. But such suggestions would weaken the clear agency decision responsibility for the legal findings in the FONSI.

In the following paragraphs, I explain why most agencies have chosen to keep the s-word ("significantly," "significance," and "insignificance") out of EAs. And as I explain below, agencies usually avoid the stating in an EIS that an impact is significant.

I begin with the legal language triggering discussions of possibly significant impacts. Section 102(2)(C) of the National Environmental Policy Act of 1969 mandates that agencies of the Federal Government prepare a "detailed statement" on ". . . proposals for legislation and other **major Federal actions significantly affecting the quality of the human environment . . . .**"

The quoted language from NEPA introduces the notion that for impacts "significantly affecting [resources in the] . . . human environment" agencies need to prepare a "detailed statement." We now call this statement an Environmental Impact Statement (EIS). Although not included in the NEPA statute language, a parallel mandate has evolved: Agencies prepare an Environmental Assessment when impacts are uncertain and when the agency needs to decide if impacts might be significant. See CEQ Regulations, Section 1508.9. Notice how both the conceptual roles of an EIS and EA reinforce the concept of a legal threshold of significance.

Early NEPA analyses, those in the 1970's and early 1980's, did set thresholds of significance. For example, an early NEPA analysis might have said that a projected decrease in recreational activities of 8 percent would be a significant impact on recreation. Many similar resource percentages appeared, all based on agency claims that they were legitimate thresholds of significance. But notice that the recreation percentage is not linked to any scientific data. Such percentages did not even have a clear context or an analysis of impact intensity. Did the 8

percent decrease apply equally to a National Pack with thousands of visitors weekly and to a small campsite area for 20 campers in a secluded valley?

Such ad hoc thresholds were obviously flawed. Agencies found them indefensible even as environmental organizations began to quote them back to agencies, arguing that an agency's stated percentages constituted legal precedents. Agencies abandoned numerical thresholds over 30 years ago.

As far as I know, no agency today has numerical thresholds for the significance or insignificance or impacts, as related to NEPA statutory language. Some numerical prohibitions do exist in laws such as the Clean Water Act or the Clean Air Act. Such prohibitions are de facto thresholds because a Federal agency cannot plan to violate a Federal law in an implementable alternative. But such prohibitions from other Federal laws are not the same as impact projections under NEPA (even when the projections are based on the best science).

In discussions of NEPA impacts, agencies today rely on **the context and intensity of each identified impact**. Such an approach is the basis for Section 1508.27 from the CEQ Regulations. Section 1508 tells agencies that each impact of concern has to be analyzed in terms of its context and its intensity (that is, the "severity of impact"). Current agency NEPA Handbooks emphasize that an EA should provide measurable context and intensity information about all potential impacts of concern or relevance.

Then, in an agency's Finding of No Significant Impact (FONSI), the context and intensity information is linked to discussions of significance. So the FONSI becomes a legal decision document, recording the NEPA finding that an EA has not disclosed any impacts of significance. Notice the distinction between the roles of EA and FONSI. The EA discloses the impacts (without the s-word) while the FONSI records the agency's legal decision/its findings (with the s-word) regarding the disclosed impacts.

Agency legal findings about the significance of impacts are essentially political decisions. Because of this decision authority, agencies do not want individual resource specialists coming to their own significance determinations in an EA or in a specialist's technical report. In many early NEPA analyses, specialists discussed their personal views of potential significance resource by resource. Chaos, indeed!

The role of each specialist contributing to an EA is to provide context and intensity information that is as quantified and as unbiased as possible. An example would be total acres of habitat lost to deer or elk (neither species subject to ESA, Section7). A parallel measurement would be a decrease in available forage, quantified if possible, perhaps by tons or animal unit months. If quantifications are not possible, then resource specialists need to choose and explain a conclusion term for their impact projections: negligible impacts, minimal impacts, moderate

impacts, or major impacts. The National Park Service uses such a scale of judgment words in its requests for NEPA information from contractors. Note that the scale of judgment terms does not link to a bogus significance threshold.

Then the agency makes and records in a FONSI its legal determinations as to the significance or insignificance of the impacts disclosed in the EA. And yes, agency NEPA practitioners likely lobby decision makers as to the significance of impacts. The final decision authority for a FONSI is, however, the agency's.

Current agency NEPA handbooks do not recommend that an EA introduce the concept of significance and discuss it for each resource. And no handbook or methodology records a clear numerical threshold of significance. Instead, agency handbooks stress clear and useful context and intensity information in an EA. So the point of an EA is to disclose impact information about all affected resources. Such impact information should be as informative and as objective as possible. The EA impact analyses should not include legal findings about whether the impacts are above or below a significance threshold.

I conclude with two agency examples that reinforce the different legal roles of an EA and, as appropriate, of the resulting FONSI.

**NEPA Handbooks from the Land Management Agencies.** Recent NEPA Handbooks for the Bureau of Land Management, National Park Service, and the Forest Service emphasize that impact projections for each resource should provide sound context and intensity information in the text of an EA. Each agency's handbook quotes and closely follows the impact guidance in Section 1508.27 in the CEQ Regulations. But they only mention discussions/determinations of significance when they establish the legal role of a FONSI and when they list the proper content for a FONSI.

Agency guidance clearly separates a resource specialist's context and intensity information (as would appear in an EA or EIS) from legal determinations of significance in a FONSI or from the decision rationale for choosing one alternative over another (as in a Record of Decision for an EIS).

**U.S. Department of Energy.** In 1993, NEPA practitioners in the DOE prepared *Recommendations for the Preparation of Environmental Assessments and Environmental Impact Statement*s for DOE personnel to use in their compliance with NEPA. This Guide (called "the Green Book" because of its cover) was reissued in a Second Edition in December 2004. The Guide is noteworthy because of its clear guidance about when and when not to use the words "significance" or "insignificance." Guidance about significance determinations is almost identical in the two editions.

Here is the relevant text from the Second Edition, Section 10.1, p. 41:

**"In EAs, do not use the word "significant" or "insignificant" in conclusory statements. Conclusions of overall insignificance or significance will be made in a finding of no significant impact or a determination to prepare an EIS."**

What impact information should appear in an EA? Both the DOE guidance and the handbooks from the land management agencies say much the same thing. Impact information should be objective and descriptive, and quantifiable if possible. But all of the guides and handbooks remind individual preparers of an EA (or an EIS, for that matter) that they do not make the final agency decisions, either as to the choice of alternatives or as to determinations of no significant impacts.

And as a final suggestion, NEPA writers need not label impacts in an EIS as significant or insignificant. The moment an agency publishes such an EIS, members of the public will view such labels as legal precedents. From a NEPA perspective, agencies need to describe in an EIS the impacts of their proposed action and alternative—using clear context and intensity information. Such impact descriptions need not mention the slippery concept of significance. And the Record of Decision for an EIS also does not need to discuss the significance of different resource impacts.