

Spot the NEPA Flaws: a Webinar Exercise

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The Shipley Group has begun to provide web-based live virtual classrooms (webinars) for its main National Environmental Policy Act (NEPA) workshops and for tailored documentation workshops dealing with technical or scientific information. Advantages for clients include no travel costs and the option of staying home while participating in the webinar. Webinar participants also receive the same Shipley reference manuals.

From an instructor's perspective, webinars encourage me to use each client's time efficiently. The typical 3-day webinar has about 13.5 hours of contact time vs. perhaps 21 hours for a traditional 3-day workshop. Despite the shortened contact time, I am still able to cover the same core topics.

One tool I have introduced in my webinar sessions is several self-checking "quizzes" on workshop topics. The format for these quizzes, called "Poll Pods," is a list of statements that poll participants for their reactions to each statement. Each participant's responses appear on my computer, so I see results of a Poll Pod almost immediately. Then we can discuss their responses. Notice all are responding, not just one person raising a hand as in a traditional workshop.

The following list of statements about National Environmental Policy Act (NEPA) compliance is a sample Poll Pod from my last NEPA webinar. As an overnight assignment, I asked participants to review a recent agency Environmental Assessment (EA) for NEPA compliance. Then the next morning I asked participants to record their responses to the following statements about the EA. The EA they reviewed had a number of compliance problems, as recorded in many of the following statements.

Let me suggest that readers of this newsletter review the following statements. Even without seeing the actual EA—

- 1. Can you spot potential NEPA flaws (that is, compliance steps that were weak or unacceptable in the EA)?**
- 2. Which of the flaws is so serious that it would be legally fatal if the EA were challenged in Federal court? (These are often called fatal flaws.)**

Here are the Poll Pod statements about the EA:

1. The EA has sketchy and missing context and intensity information about potential impacts.
2. No Action impacts are projected to be the same as the existing resource conditions.
3. The EA has a written rationale for the analysis of only a single action alternative (the Proposed Action); the rationale references the project objectives and notes that the public did not suggest an action alternative different from the Proposed Action.

4. Mitigations and major design features are scattered throughout the EA, and some appear not to be listed or discussed.
5. It is not clear how extensive scoping was, especially meetings with the public.
6. Mitigations are assumed to be effective, but analysis proof in the EA is missing; the Finding of No Significant Impact FONSI asserts that possible impacts of concern can be mitigated but provides no list of reasons supporting the assertion.
7. Tiering proposed actions and associated information goes back to an earlier NEPA Environmental Impact Statement (EIS) analysis and signed Record of Decision (ROD); the agency is still relying on decisions in that signed ROD.
8. An unsupported assertion in the EA is that the current EA actions are consistent with the guidance/decision in the EIS; the EIS and its Record of Decision were completed nearly 30 years earlier.
9. Cumulative impacts are mentioned, but no well-defined area of impacts, and little information about past actions in the project area and sketchy information about future actions.
10. No clear summary of direct, indirect, and cumulative impacts appears anywhere in the EA; the public and even the agency decision maker would have to search for statements about projected impacts.
11. The FONSI does not reference either pages or section numbers from the analysis information in the EA; there is a blanket statement that the EA shows that the impacts will not be significant because impacts can be mitigated.
12. Monitoring is mentioned several times, with the implication that future monitoring will validate that mitigations are effective.

Webinar participants identified many of the compliance problems with the EA. I was pleased with their observations. They were also unanimous that the EA would not survive legal challenge, as written. They would recommend that the agency rework the content of the EA before making a decision about the FONSI.

Statements 1,2,4, 5, 6, 8, 9, 10, 11, and 12 reflect compliance problems in the EA. Statements 1, 4, 6, 10, and 11 are the most serious compliance problems, thus candidates for the Fatal Flaw label.

Statements 3 and 7 record desirable compliance information, so these are not compliance flaws.

Below I provide brief comments on each statement. For clarity, I reprint the statements above each comment.

1. The EA has sketchy and missing context and intensity information about potential impacts.

Section 1508.27 in the Council on Environmental Quality (CEQ) Regulations links context and intensity information to the key legal finding about potential significant impacts. Without context and intensity information, NEPA compliance is impossible.

2. No Action impacts are projected to be the same as the existing resource conditions.

This compliance flaw has two problems. The first is that readers have to review the existing conditions for each resource; such information is often incomplete or missing, as in the current EA. The second problem is that the Proposed Action impacts will exist 10 or 20 years in the future, so for a clear comparison, readers need to know the impacts of No Action 10 or 20 years in the future. Such future impacts of No Action are not likely to be the existing conditions today.

3. The EA has a written rationale for the analysis of only a single action alternative (the Proposed Action); the rationale references the project objectives and notes that the public did not suggest an action alternative different from the Proposed Action.

A brief explanation of the “range of reasonable alternatives” is desirable, especially when only one action alternative (the Proposed Action) is analyzed. This rationale is not a compliance flaw.

4. Mitigations and major design features are scattered throughout the EA, and some appear not to be listed or discussed.

A mitigated Proposed Action has always been a legal risk. What are the mitigations proposed? Will they be fairly and completely implemented? And then, will they be effective in preventing adverse impacts?

Such questions are why an EA should have a clear list of all mitigations (often called design features or best management practice). Then the analysis information in the EA should assess the effectiveness of all listed mitigations. The reality is that mitigations are rarely 100 percent effective in preventing adverse impacts. So what adverse impacts remain even after mitigations are in place?

5. It is not clear how extensive scoping was, especially meetings with the public.

An agency has a legal responsibility to inform and to involve all interested and affected parties—other agencies, Indian Tribes, and the public (both individuals and groups). An EA should summarize such public involvement as an element of good legal disclosure.

6. Mitigations are assumed to be effective, but analysis proof in the EA is missing; the Finding of No Significant Impact FONSI asserts that possible impacts of concern can be mitigated but provides no list of reasons supporting the assertion.

See my analysis of statement 4 above. A mitigated FONSI should always include a list of reasons why listed mitigations are judged to be effective in decreasing adverse impacts.

7. Tiering proposed actions and associated information goes back to an earlier NEPA Environmental Impact Statement (EIS) analysis and signed Record of Decision; the agency is still relying on decisions in that signed ROD.

Tiering to a prior NEPA document and signed decision is just good planning. Many decisions are properly made and recorded in broad planning or programmatic documents. Then these prior decisions guide lower-level, site-specific decisions. So the decision to use tiering is good NEPA compliance, not a compliance flaw.

- 8. An unsupported assertion in the EA is that the current EA actions are consistent with the guidance/decision in the EIS; the EIS and its Record of Decision were completed nearly 30 years earlier.**

Problems with tiering as a NEPA tool appear when the prior document is either out of date or when changing conditions have occurred. Both problems are likely present if the prior decision was 30 years ago.

A further compliance problem is the unsupported assertion about consistency. The EA should summarize reasons supporting consistency. The EA might also have an attached letter supporting consistency from a State or from another Federal agency, such as the U.S Fish and Wildlife Service.

- 9. Cumulative impacts are mentioned, but no well-defined area of impacts, and little information about past actions in the project area and sketchy information about future actions.**

Any mention of cumulative impacts routinely requires an area of potential impacts for each affected resource and brief discussions of past actions and likely future actions that influence impact projections.

- 10. No clear summary of direct, indirect, and cumulative impacts appears anywhere in the EA; the public and even the agency decision maker would have to search for statements about projected impacts.**

Summary statements are crucial, as a way to guide readers to see what impacts are likely to occur. Such individual statements can be combined into a summary matrix or a page or two of summary text. Such a consolidated summary should be a stand-alone document. It can then be attached to the FONSI as supporting evidence for the legal finding.

- 11. The FONSI does not reference either pages or section numbers from the analysis information in the EA; there is a blanket statement that the EA shows that the impacts will not be significant because impacts can be mitigated.**

See comments above on statements 4 and 6. Some brief impact discussions are now appropriate in the FONSI, especially because the public needs to be assured that listed mitigations will be implemented and will be effective. Such assurances are properly part of a well-supported FONSI.

- 12. Monitoring is mentioned several times, with the implication that future monitoring will validate that mitigations are effective.**

Monitoring is not the same as mitigations. Adverse impacts may well occur even before monitoring discovers them to be present. So monitoring does not prove the effectiveness of mitigation. Monitoring does prove that the agency and proponent have implemented the promised mitigations; their effectiveness is a separate topic.

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