

## Test Your NEPA Expertise!

Several months ago I ran across an interesting NEPA problem. I summarize its details below and then I ask a series of questions. If you fancy yourself a seasoned NEPA practitioner, test yourself.

*(To protect the innocent, I have changed all the site-specific details and have given the agency a fictitious name.)*

### The Problem

The Federal Agency for Development and Evaluation (FADE) completed a detailed project-specific FEIS in 2001. FADE signed a Record of Decision (ROD) and began construction at the proposed site.

The chosen alternative (a variant on FADE's proposed action) included extensive construction, access roads, parking, and associated development of travel links with an existing light rail system. Construction was only partially funded, so estimates for completion of the entire project ranged up to 8 years. Construction began, but at a slow pace.

Last year FADE's NEPA staff determined that specific project actions could not be completed as analyzed in the FEIS. Problems existed with newly discovered unstable soils, with some indirect impacts on water quality in nearby marshes and intermittent streams, and with some newly discovered Native American burial artifacts. FADE considered these problems minor, but the project actions were changing enough that FADE needed to do further NEPA analysis and documentation.

FADE prepared "a supplementary EA" that analyzed changes to the alternative signed off in the prior ROD. The analysis in the EA was tiered to the FEIS (and ROD), with many resource conclusions summarized like this: "Impacts on resource X do not exceed those disclosed in the FEIS in 2001. See the FEIS for details about those impacts."

FADE signed a FONSI early in 2005 on this revised project. The rationale for the FONSI was that the FEIS had already analyzed most impacts of interest, including cumulative impacts on water quality. Impacts from the revised project did not exceed impact levels discussed in the FEIS. Thus, FADE tiered the new FONSI to the original ROD.

### Test-Yourself Questions

1. True/False. A supplementary EA was the best compliance path for FADE to follow.
2. True/False. FADE correctly chose tiering as the primary NEPA tool to use in its preparation of the new EA.
3. True/False. The discovery of Native American burial artifacts, which trigger the Native American Graves and Protection and Repatriation Act (NAGPRA), makes an EA legally impossible.
4. True/False. FADE should have checked with EPA before preparing the EA because EPA is responsible for a compliance review of the new EA, just as it was for the original FEIS.
5. True/False. FADE correctly incorporated by reference the effects information in the FEIS as the main support for findings in its new FONSI.
6. True/False. FADE was correctly using incorporation by reference as a way to summarize in the EA background information that was already in the FEIS.
7. True/False. FADE was not required to conduct new NEPA scoping, but some new scoping might have been advisable, especially given the changed project actions and changed impacts.
8. True/False. Under NAGPRA, FADE had to stop construction (a minimum of 30 days) and consult potentially affected Native American tribes. This action occurs immediately upon discovery and would only be documented later in subsequent NEPA analysis of the project area.
9. True/False. FADE's decision to do a supplementary NEPA document was a good

NEPA compliance strategy because the site-specific actions appeared to be outside the scope of the FEIS and ROD.

10. True/False. The original decision in the ROD, including any commitments for mitigation, remains in effect unless changed by the new NEPA document (EA and FONSI).

#### Answers to the Test

1. True/False. A supplementary EA was the best compliance path for FADE to follow.

**False.** FADE had two different choices as it initiated its new NEPA compliance on the project: the level of NEPA compliance and how best to revise decisions in the original FEIS and ROD. Given the project changes (new site-specific actions replacing any parts of an earlier site-specific project); a supplementary EIS would have been the best choice. This supplementary EIS would have analyzed the substantive changes to the project with the same level of NEPA compliance as in the original EIS.

Choosing to do an EA, not an EIS, is risky. The original EIS sets a precedent for this project, and the public is likely to wonder why an EA is appropriate, given the scope of the action as covered in the original EIS. Also, a supplementary EIS would have processed the analysis, including scoping, at the same level of effort as in the original EIS.

2. True/False. FADE correctly chose tiering as the primary NEPA tool to use in its preparation of the new EA.

**False.** Tiering is most commonly used when an agency has a “broad environmental impact statement . . . (such as a program or policy statement)” (CEQ Regs, 1501.11). In this instance, the original EIS was a site-specific project, so tiering (in the program sense) would not be especially useful.

A supplement is usually the tool for an agency to use when project details change or when new resource information surfaces.

Yes, the line between tiering and a supplement is not all that clear. Similarly, the line between tiering and incorporation by reference is also fuzzy. Tiering, as Section 1501.11 says, goes back to a prior NEPA document (and its decisions). This prior NEPA document is binding on the agency (because of signed ROD). In contrast, incorporation by reference can apply to any information that is relevant (thus not limited to prior NEPA information).

3. True/False. The discovery of Native American burial artifacts, which trigger the Native American Graves and Protection and Repatriation Act (NAGPRA), makes an EA legally impossible.

**False.** NAGPRA does not cancel the option of an EA. Some NAGPRA discoveries can and should be analyzed at the EA level, not at the EIS level. An agency doesn’t know until it has done the proper consultation, with the State Historic Preservation Officer and with, as relevant, any Tribal Historic Preservation Officers

4. True/False. FADE should have checked with EPA before preparing the EA because EPA is responsible for a compliance review of the new EA, just as it was for the original FEIS.

**False.** EPA has no regulatory role advising agencies about their level of NEPA compliance. Also, EPA does not usually review EAs; its role as a NEPA document reviewer is limited to EISs. EPA might be involved in an EA if a project was likely to affect resources managed by the EPA (air, water, hazardous substances, etc.).

An agency wanting advice about NEPA compliance should contact the Council on Environmental Quality. Note, however, that CEQ does not routinely or regularly review either EISs or EAs for the adequacy of their compliance.

5. True/False. FADE correctly incorporated by reference the effects information in the FEIS as the main support for its new FONSI.

**False.** FADE properly could incorporate effects information (especially background information), but

it could not rely on this FEIS information as the main support for its FONSI. Most EISs either don't assess the significance level of impacts, and if they do, they are likely to label an impact as significant, without bothering to present quantified proof.

The preceding means that the typical EIS does not provide the sort of quantified information that could support a FONSI. Just because impacts have been analyzed in an EIS, these impacts are not clearly significant (or non-significant). The new EA and FONSI can only rely on FEIS information if the FEIS carefully quantified the impacts (in a manner that allows the agency to get to FONSI). In other words, the new EA must clearly discuss site-specific analysis and disclose impacts to reach a conclusion of non-significance.

6. True/False. FADE was correctly using incorporation by reference as a way to summarize in the EA background information that was already in the FEIS.

**True.** FADE properly wanted to reference general background information from the FEIS. This is proper, and CEQ Regulations encourage agencies to use incorporation by reference in this fashion.

But even in this instance, the EA cannot rely on FEIS information to support the FONSI rationale unless the FEIS provided very clear site-specific analysis, which it didn't.

7. True/False. FADE was not required to conduct new NEPA scoping, but scoping might have been advisable, especially given the changed project details.

**True.** Neither CEQ nor agency procedures routinely mandate new scoping for an EA in this situation. The decision to conduct or update scoping is an agency choice given its assessment of each project. Of course, if FADE had chosen to prepare a supplementary EIS, then new scoping would have been part of the EIS process, beginning with a new Notice of Intent.

8. True/False. Under NAGPRA, FADE had to stop construction (a minimum of 30 days) and consult potentially affected Native American tribes.

**True.** The 30-day work stoppage is a standard provision under NAGPRA. And the law also requires the agency to consult with affected Native

American tribes (sometimes more than one tribe is the possible source for artifacts). No NEPA analysis is necessary unless the consultation results in an agency action that would ordinarily fall under NEPA.

9. True/False. FADE's decision to do a supplementary NEPA document was a good NEPA compliance strategy because the site-specific actions appeared to be outside the scope of the FEIS and ROD.

**True.** FADE's NEPA folks made a good call when they decided that new project details and resource information mandated new NEPA compliance. This decision shows that they were aware that the changed project was not covered by the original FEIS and ROD. Where they made a questionable call was to prepare an EA, not an EIS. See question 1 above.

10. True/False. The original decision in the ROD, including any commitments for mitigation, remains in effect unless changed by the new NEPA document (EA and FONSI).

**True.** This is the role of a signed decision document (ROD in this case). It commits the agency to doing x, y, and z on the ground. These commitments are binding on the agency until replaced or changed by a new NEPA analysis and associated documents.

### How did you do on the test?

If you got 8, 9, or 10 questions correct, congratulations! You are likely a seasoned NEPA practitioner and you probably found the test too easy.

As with any short text, the results are not a significant measure of your NEPA knowledge and expertise.

On some questions, you might have been left behind in the testing process by your assumptions, which may not have been the same as in the original problem (which I summarized only briefly). Many NEPA answers rely on project-specific details, which are difficult to capture in a brief summary.

### Key NEPA Lesson from the Problem

The reason I chose the problem for discussion in the Shipley newsletter was the original agency's use of an FEIS to support a FONSI. As discussed above, an

FEIS used in this fashion would have to have very site-specific discussions of all impacts (framed as to their context and intensity). These discussions would have to parallel the same sort of information usually presented in carefully written EAs. Most EISs do not have this sort of detailed impact information.

In fact, a common observation among agency NEPA folks is that preparing a defensible EA and FONSI usually means meeting a higher standard than preparing a routine EIS. The reason for this belief is that a FONSI really relies on the agency's certainty that the impacts will not be significant. In an EIS, an agency can usually ignore a quantified threshold of significance. Thus, in an EIS, discussions of impacts need not be as clearly or as firmly quantified as they often have to be in an EA.

For more information contact Jeff at (888) 270-2157 or visit us online at [www.shipleygroup.com](http://www.shipleygroup.com).