

NEPA at 40

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What constitutes a successful National Environmental Policy Act (NEPA)¹ process? Responses by NEPA supporters would likely include statements such as “a full examination of the relevant issues,” “understanding the implications of a proposed action,” or “making informed and reasoned decisions.” In 2007, the Virginia Polytechnic Institute (VPI) asked NEPA compliance staff at the National Park Service, Bureau of Land Management, U.S. Army Corps of Engineers, and the U.S. Forest Service the same question.²

The results, published in April 2007, suggest that agencies implementing NEPA may not share the lofty goals that the congressional sponsors of NEPA envisioned in 1969. In response to the question what constitutes a successful NEPA process, 72% of agency staff responded stating “the project was implemented,” 16% responded “a good final decision,” and 4% responded “a well-documented rationale for the decision.” These results bespeak a view among key federal resource management agencies that a successful NEPA process is not about improved analysis and decisionmaking but is about completing the agency’s action plan.

An interesting and related question in the VPI study was “what is the purpose of the NEPA process?” Only 35% of the NEPA officials in the four agencies responded “improved environmental understanding.” Interestingly, another 35% of the respondents stated NEPA was a necessary process that had to be undertaken to avoid litigation.

After 40 years, NEPA is seen by many federal agencies as yet another mountain to climb in the path to project implementation rather than as a tool to aid and improve decisionmaking.

I. Improving NEPA Compliance: Scoping

To improve NEPA compliance, we need to change how we measure a successful NEPA process. The measure of success is not that the project was implemented, but that there was an improved analytical process such that the decisionmaker fully understood the consequences of his or her decision.

The first step toward this objective is to improve the scoping process. Scoping is the process for determining the issues to be addressed and the significant matters related to the proposed action.³ Although the Council on Environmental Quality’s (CEQ’s) regulations encourage an early and open scoping process,⁴ many agencies prefer to wait until project details are worked out. Perhaps this reflects the view that a successful NEPA process means the project is implemented.

Agency staff often fear that early scoping will only result in bringing project opponents into the planning process before the agency is truly ready to defend the project. Agencies fearful of early scoping tend to confuse the issue of whether we need the project with the issue of what questions we need to consider in making that decision. Scoping should identify the issues to be considered in determining the impacts of the proposed action and of the no-action alternative. Scoping is not about the project’s purpose, assuming that purpose is not so narrowly drawn as to make only one option viable. Scoping is about issue identification, so an informed decision can be made.

Early and serious scoping should help agencies because the earlier environmental issues are identified, the easier it is to design around and mitigate potential problems, thus minimizing future conflicts and perhaps expediting the project. By planning the project first and then considering environmental consequences, agencies may lock in potential problems. Viable options may not be explored until after positions are fixed and battle lines drawn. The fact is that resource agencies and other interested parties may see issues that the project sponsor may not see, and early involvement by the resource agencies and other experts can help.

The flip side of the coin is that resource agencies and other interested parties do not always take scoping seriously. CEQ regulations do not require a scoping meeting. Equally important, there is no penalty for failing to participate in the scoping process. To address these issues and to improve the scoping process and, therefore, NEPA:

- the CEQ should require a scoping meeting and provide guidance on when in the continuum of project planning a scoping meeting should be convened; and

1. 42 U.S.C. §§4321-4370f, ELR STAT. §§2-209.

2. MARC J. STERN & MICHAEL J. MORTIMER, DEPARTMENT OF FORESTRY, COLLEGE OF NATURAL RESOURCES, VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY, COMPARING NEPA PROCESSES ACROSS FEDERAL LAND MANAGEMENT AGENCIES (Apr. 12, 2007).

3. 40 C.F.R. §§1501.7, 1508.25.

4. *Id.* §1501.7.

- the CEQ/the U.S. Congress should provide that NEPA documents cannot be challenged because of the failure to address an issue not identified in scoping. This gives the action agency a reason to support early scoping and forces all parties to the table.

However, everyone needs to recognize that information and understandings regarding a proposed action may not be complete at early project planning stages and that additional scoping may be required as the planning process unfolds. Revised CEQ regulations need to address this issue as well.

II. Improving NEPA: Programmatic EISs and Adaptive Management

If scoping is one way to map an analytical strategy for decisionmakers, a programmatic environmental impact assessment (EIS) can be another effective NEPA tool for mapping strategies. When NEPA was first enacted, programmatic EISs were not given much attention. Prevailing thought was that ecosystems were in some balance and that from a stable baseline we could measure the impact of a single project. Therefore, broad EISs were not in the forefront of NEPA thinking.

Today, agencies continue to apply that single-issue analytical framework in most cases, a framework premised on ecosystems being static and in a constant equilibrium. However, since NEPA's inception, scientific thought has evolved. So too, should we refine our thinking about the role of programmatic EISs. We now think of ecosystems as being dynamic, not static, and as being affected by multiple forces, many of which we understand rather poorly. It is this refined view of ecosystems that should cause us to rethink the role of the programmatic EIS.

Consider for a moment the ocean environment, global warming, and the effect of global warming on ocean temperature. Rising ocean temperatures may be altering long-held assumptions about what constitutes suitable habitat for certain species. As species in our hemisphere shift northward, species interactions and habitat needs will change. Seemingly separate management decisions will, in fact, become interrelated.

An example might well be the conservation needs of sea otters off California's central coast. Sea otters are listed as a threatened species under the Endangered Species Act (ESA).⁵ The U.S. Fish and Wildlife Service (FWS) is considering range expansion, principally to the south, as a means to recover the sea otter. But the FWS is not considering the effect of that proposal on other species protected by the ESA, such as endangered abalone living in areas where FWS wants sea otters to go. The issue is that abalone are a favorite food

of otters, who are known as voracious eaters. FWS is also not considering the issue of water quality that is central to sea otter recovery. Equally important, no one is focusing on whether ocean warming will cause sea otters to shift northward, abandoning or reducing usage of their current habitat and creating new species interactions. In short, no one is looking at the overall picture and how to move forward with a resource management plan that is capable of adapting to a changing environment.

What could be helpful here, and what could be helpful in many similar complex resource management issues, is better use of a programmatic EIS, coupled with tiering, adaptive management, and greater interagency cooperation and coordination. For NEPA to evolve to better meet today's ecosystem resource management goals, the more traditional NEPA model of an EIS addressing a single action may no longer be the appropriate tool in virtually every case. Agencies should more frequently utilize a programmatic EIS focused on larger ecosystem management issues.

This approach could help in anticipating and addressing the resource impacts of global warming. The fact is that resource management issues will likely be impacted by global warming, but we simply do not know all of the impacts. What we do know is that global warming will affect the dynamics of functioning ecosystems. Here, NEPA can be a significant tool for analysis.

However, if we are going to travel this road, we need to go further. We need to require a system for monitoring the impacts of actions considered in the programmatic EIS and considered in subsequent decision tiers that follow the programmatic EIS. Effective monitoring will enable decisionmakers and interested parties to determine the impacts of actions, so that there is an appropriate strategy to mitigate the impacts of the action and to adapt management decisions accordingly. This, of course, assumes sufficient baseline information from which changes can be measured. It also assumes an effective use of tiering for future decisions.

With respect to tiering, it is important to avoid the shell game of agencies stating that certain issues are being put off for later analysis. But when that later time comes, the agency does not examine the issue, now asserting the issue was considered in an earlier document. To address this problem, a programmatic EIS should specifically identify issues being left for future analysis. However, it is equally important that there not be a reverse shell game in which tiered documents are automatically used to reopen issues already addressed in earlier tiers.

To facilitate better use of programmatic EISs, the CEQ should do the following:

- issue guidance on the appropriate and potential use of programmatic EISs, particularly to address resource

5. 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18.

conservation issues in the ecosystem context and to address the ecosystem impacts of global warming;

- provide additional guidance on interagency cooperation regarding the preparation of programmatic EISs involving multiple agencies;
- require monitoring regarding the expected impact of actions, including mitigation programs;
- issue specific guidance on the use of adaptive management principles;
- require that a programmatic EIS specify the issues being left for future tiered analysis; and

- issue guidance on if and when a tiered document can be the basis for reconsidering issues already considered in earlier tiers.

One problem with this concept of a broader utilization of programmatic EISs is that NEPA court cases often find fault with the action agency when it fails to carefully define the project and the alternatives. A programmatic EIS of the type discussed above may be more akin to a very sophisticated scoping process that employs adaptive management as events unfold. Therefore, the CEQ needs to provide more complete guidance on how a programmatic EIS can be used to develop a broad management program and policy for interrelated resource systems.

Programmatic EISs are not a new concept. However, their use could be improved if they were better employed for resource management in an ecosystem context.