Demystifying NEPA to Speed the Review and Permitting of Energy Generation and Transmission and Other Projects and Programs

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Our nation's infrastructure is deteriorating, damaging our economic growth, security, and environmental quality. Unfortunately, many needed improvements are suffering unnecessary delays from multiple, sequential, and often poorly coordinated federal, state, and tribal reviews, consultations, and approvals. In our experience, controversy, conflict, and delay are often due to a misunderstanding of the intent of the National Environmental Policy Act (NEPA)[1] and its contribution to agency planning procedures. Part of its power is its flexibility for integrating the alternative and impact analyses of other environmental laws and executive orders into comprehensive planning.

As described by the Environmental Law Institute in 1995: "NEPA is an intelligent law. It uses a model of thinking about nature, the economy, individual rights, and decision making that we are only now beginning to understand."[2]

The President's Council on Environmental Quality (CEQ) NEPA regulations and agency implementing procedures provide a flexible, strong, and very adaptable way to integrate reasonable environmental and human health and safety measures into plans for proposed projects. Unfortunately, destructive "myths" regarding NEPA requirements are commonly shared among agency, applicant, and contractor organizations by management, legal advisors, administrators, and the public. Due to misunderstandings of the power of NEPA, the adaptable, practical, and effective planning processes inherent in NEPA procedures are unfortunately missed or misapplied, often creating unnecessary delays, conflict, litigation, mistrust, and sometimes shattered relationships.

Forty years after the passage of NEPA, we still unnecessarily struggle with this "intelligent law." Each of us has the opportunity to improve our planning and informed decisionmaking using NEPA as the procedural bridge connecting our abilities and skills in working together to find effective, sustainable, and cost-effective solutions.

Here, we address some of the common and damaging myths associated with NEPA. A brief discussion emphasizes how, with proper project planning and integration, NEPA can make practical and timely contributions to effective and sustainable project planning[3] and successful project implementation. We must make clear that, in the NEPA context for this Article, the word "planning" is used comprehensively to include all aspects of site-specific project development and analysis during the pre-application and application processes involved in using federal land for infrastructure projects.

Before developing a planning strategy, always consider common NEPA myths and effective means to overcome their influence on project planning and implementing processes. A strong focus on interdisciplinary communication at all levels throughout the planning process pays off handsomely. NEPA myths concerning the use of federal land for project improvements are overcome through the integration of planning and environmental document preparation and the thoughtful awareness and implementation of powerful and effective project planning strategies**.** The following examples briefly describe how to identify and avoid NEPA "myths" and to use NEPA for its full advantages, strengths, and intelligence.

Authors' Note: The authors wish to thank Mr. Rick Loughery of the Edison Electric Institute for suggesting that we prepare an article to help project proponents and government officials identify and overcome many of the time wasting myths encountered in the development and approval of electric generation and transmission projects crossing federal land.

1. 42 U.S.C. §§4321-4370h, ELR Stat. NEPA §§2-209.
2. James McElfish, Rediscovering the National Environmental Policy Act: Back to the Future (Envtl. L. Inst. 1995).
3. 40 C.F.R. §§1500.2 and 1501.2.

I. Fact: Avoiding Delays and Managing Progress Increases Efficiency

A. *Myth: NEPA Makes It too Difficult to Use Federal Land for Needed Energy Infrastructure*

It is not NEPA, but how NEPA is understood and applied that often makes the use of federal land problematic. NEPA requires the federal deciding official to consider the environmental and related consequences of his or her action in order make an informed and, hopefully, wise decision. NEPA requires federal-authorizing agencies to evaluate, communicate, and understand the effects of actions proposed by applicants within the context of agency policies, mission, and responsibilities. Applicant needs may not be inherently compatible with agency land use and management policies and precedent, yet the proposed land use may still be in the national and public interest and a reasonable use of federal land.

NEPA regulations are clear: "Each agency shall interpret the provisions of the Act as a supplement to its existing authority and as a mandate to view traditional policies and missions in the light of the Act's national environmental objectives."[4] NEPA's intent is not to delay or stop good projects, but to integrate environmental considerations into project planning to make good projects more effective and sustainable, without unnecessarily foreclosing future options. How NEPA processes are used is key to fulfilling the intent of the nation's environmental policy stated in the Act.

B. *Myth: NEPA Is the Primary Cause of Delays in Approving Projects*

In fact, environmental evaluations and analyses of alternatives and impacts accurately and clearly described in readable environmental documents are completed efficiently when the engaged parties are experienced in systematic planning processes and interdisciplinary evaluation, and the parties are properly motivated, organized, and managed. Our experience in the long-term use of Integrated Planning and Review™ using Informed Facilitation™ and Facilitated Planning™ demonstrates positive results among a wide variety of agencies with varying missions and project objectives.

Common causes of project delay and unnecessary conflict include agency and/or the proponent changing the need for action and/or the proposed action during the environmental evaluation process; not identifying issues early; or not including reasonable alternatives and mitigation in the original array. Continual redefinition of a proposed project creates the need for consideration of new alternatives, possibly new field studies, and revised impact analyses. Also, the U.S. Forest Service and U.S. Department of Interior (DOI), including the Bureau of Land Management (BLM), have processes for appealing or objecting to decisions of federal officials, which may add additional time to project schedules.[5]

Government officials often delay review of contractor-created environmental drafts until a 35% or 65% stage of completion. Reviews at such late stages of document preparation often trigger extensive revisions and additional reviews and revisions throughout the remainder of planning and document preparation. The back and forth of "do, review, and redo" creates lengthy internal comment and review cycles, multiple revisions, unfocused analyses, and poorly prioritized analyses of issues important for decisionmaking. These frequently adversarial reviews and corrections often create unnecessary conflict among the agency, proponent, and contractors, and higher costs.

Planning and permitting of electric transmission lines is inherently complex and typically create a long-term presence within multiple landscapes, communities, and jurisdictions. Projects are often costly and require lengthy planning and development schedules and compliance with multiple regulatory and administrative processes. The primary balancing for planning and permitting a complex transmission line crossing many jurisdictions, including private lands, involves integrating the procedural and substantive legal requirements at federal, and often multiple, state, county, tribal, and local levels while providing appropriate and meaningful site-specific engagement of interested and affected persons, agencies, and organizations. It is critical to share information, gain understanding, and develop acceptable strategies among these varied interests and regulatory authorities very early in project development. This balancing and integration of interests and requirements is intrinsically complex and requires the commitment of project managers and dedicated interdisciplinary teams fully supported by appropriately engaged government and project management personnel.

By properly managing environmental reviews and integrating planning procedures, the quality of project planning can be greatly improved while achieving the CEQ regulatory guidance for reducing paperwork[6] and delay.[7]

C. *Myth: Project Planning Conducted With an Authorizing Federal Agency Prior to an Agency Formally Accepting a Land Use Application, Issuing a Notice of Intent, or Conducting Public Scoping Is Often Considered "Pre-NEPA," or "Pre-Scoping" and Excluded From Estimated Time Lines to Complete the Agency's NEPA Process*

During pre-application for a land use authorization, the proponent and the federal agency should coordinate and work together to prepare a detailed description of the pro-

4. 40 C.F.R. §1500.6.

5. Note that U.S. Forest Service appeals regulations at 36 C.F.R. §215 and 36 C.F.R. §251 Subpart C are currently undergoing revision.
6. 40 C.F.R. §1500.4.
7. *Id.*

posed action and focus the analysis of the preliminary issues and alternatives. In addition, they should identify consultations and reviews that might be involved in the analysis and permitting processes, review relevant land use plans for guidance or inconsistencies with the proposed action, identify other federal and state agencies and Tribes that may need to be involved and their roles, and outline time lines, roles, authorities, and responsibilities.

These very important actions are not "pre-NEPA" or "pre-scoping." Rather, they are integral NEPA scoping processes required by 40 C.F.R. §1501.7 for environmental impact statements (EISs) and are important for streamlining environmental assessment (EA) procedures as well. According to 40 C.F.R. §1508.22, the Notice of Intent (NOI) for an EIS must briefly describe:

(1) The proposed action and possible alternatives;

(2) The agency's proposed scoping process including whether, when, and where any public scoping meetings will be held; and

(3) The person responsible for answering questions about the proposed action and the EIS.

Many of the actions identified as part of scoping in 40 C.F.R. §1501.7 must be conducted prior to the publication of the NOI in order for the NOI to be complete. The NOI (or notice of scoping for an EA) simply initiates the public aspects of NEPA, not the NEPA process itself.

The time spent by federal and state agencies and Tribes during the pre-application activities working through the pre-public scoping processes furthers the streamlining intent of project scoping. These efforts enable the federal agency to focus the EIS and the proponent to further define the proposed action, identify and avoid "fatal flaws," and create trust and positive relationships. Regardless of whether the agency decides to measure the timeliness of the EIS process from the date of the NOI (or EA public scoping notice), the date of acceptance of an application, or some other benchmark, the quality coordination conducted upfront during the pre-application process greatly increases the efficiency of the environmental review and permitting process, as well as the overall quality of the project.

If all parties are committed to the overall effort, they can work together to set efficient schedules and time lines commensurate with complexities and public engagement needs, which reduces the likelihood of "repeat planning," unnecessary document rewrites, and possible public and agency controversy. Pre-public internal scoping as defined by the CEQ regulations and conducted during the pre-application process is critical to creating a positive and committed working relationship among all parties.

The regulatory inability or administrative unwillingness of some agencies to collect cost recovery funds to pay for pre-public scoping and streamlining efforts prior to accepting a land use application may limit the ability of some federal staff to work closely with the project proponent before acceptance of the application. The issue of cost recovery prior to accepting an application may be the major contributor to inefficiencies that appear to occur once the application has been accepted and the internal and public aspects of NEPA are formally initiated. Regardless of funding sources and official NEPA "start dates," scoping work conducted and positive relationships created among the proponent and federal and state participants during the pre-application process will greatly contribute to efficiencies, timeliness, and cost-effectiveness once the application is accepted.

D. Myth: "Streamlining" Means Taking Necessary Risks Upfront to Move the Process Ahead More Quickly

Actually, streamlining involves properly initiating necessary planning and agency and public engagement strategies upfront and using the numerous streamlining and planning processes built into the CEQ regulations for NEPA to reduce costs and delays. Using these processes optimally within the context of quality planning supports well-thought-out strategies developed early in project planning and throughout project permitting and implementation.[8] Streamlining does not require taking unnecessary risks, such as setting time limits that are not commensurate with the complexity of the necessary analyses, delaying field surveys for cultural or natural resources until actual project construction, or limiting or postponing meaningful public and agency engagement.

Understanding the terms and interpretations of existing land use rights and obligations (easements, land use permits, or other authorizations) as well as formalizing operating agreements among parties regarding cost allocations, specific responsibilities, roles, schedules, and contractor management for planning and document preparation pays off in reducing overall costs and time necessary to complete reviews, consultations, and permitting. These efforts yield clear analyses and the basis of informed and well-justified decisionmaking while reducing misunderstandings and conflict.

E. Myth: There Is Little Negative Consequence to the Government and the Public in Postponing the Consideration of an Application to Use Federal Land

The president,[9] the U.S. Congress,[10] the U.S. Department of Agriculture (USDA), the DOI, and the memorandum of understanding signed by nine federal agencies in 2009 regarding coordination of planning and review of energy infrastructure projects crossing

8. 40 C.F.R. §§1500.4 and 1500.5.
9. Exec. Order No. 13212, Actions to Expedite Energy-Related Projects (2001).
10. Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005), §§368, 372, 1211, and 1221.

multiple agency jurisdictions[11] each identify procedural steps for expediting land use authorizations for the production, transmission, and conservation of energy and to ensure the reliability of energy transmission. Each of these emphasizes the federal government expeditiously moving forward with planning, permitting, and development of needed energy infrastructure.

Continually refusing to accept a completed application to use federal land or stalling a project after accepting a land use application can actually bring unwanted controversy and reduce the likelihood of positive partnerships and long-term working relationships. The Administrative Procedure Act (APA)[12] requires a federal official to act in a reasonable time regarding a pending decision or execution of their assigned duties, which is reinforced by 40 C.F.R. §1508.15 ("Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.")

Project proponents pay the government for necessary planning and reviews through cost recovery. Cost recovery regulations are in place for the Forest Service[13] and BLM,[14] as well as other procedures for transferring money among agencies lacking cost recovery authority. The key to successful relationships and efficient project planning is ensuring that a detailed formal agreement outlining responsibilities, schedules, contracting, and other efforts is negotiated, agreed to, and signed by the applicant and the authorizing agency. The CEQ regulations emphasize the role of the federal authorizing agency in assisting and guiding an applicant through the pre-application process and contributions to the NEPA process.[15]

F. Myth: I Can Get an Agency to Do What I Want if I Can Get the Washington People, My Member of Congress, or the CEQ to Pressure Them for Me

Be careful what you wish for. If a project is slowing down or is stuck, invoking the attention of higher level federal officials can get things moving, but often brings along a host of other concerns that may actually slow things down or result in an undesired outcome if not done with a thoughtful strategy. The CEQ is an advisory council to the president created by NEPA; it publicly mediates interagency NEPA disagreements, called the referral process.[16] The CEQ has no authority to force an agency to take a particular course of action, and is subject to the political policies of the Executive Office at the time. For obvious reasons, referrals are extremely rare. If you must, use any elevations that go around an agency's or department's chain of command with a clear and cautious strategy, knowing the people, interrelationships, and authorities, and not until you have tried everything within your abilities to resolve issues at the local level.

When a project is just developing and before any real issues or delays occur, we recommend that you inform higher level officials in the chain of command about the project, its purpose, the likely issues that may develop, and any real urgency for action. This early alert can prove helpful in mobilizing agency resources during the project and overcoming potential delays.

G. Myth: If I Can Just Get My Construction Permits, I Can Take Care of Operational Concerns Later, When the Project Is Built

Considering the effects of operating and maintaining an electric transmission line for 50 years or more, review of a requested permit to construct a facility must include the likely effects of the line's operation and maintenance—the connected actions of implementing the project through its life cycle. The CEQ regulations at 40 C.F.R. §1508.25 and supported by case law require all connected actions to be addressed together in a particular project EA or EIS. In addition to considering the environment over the life of the project, the interpersonal relationships created and details agreed to during review of a new project can make future operations run smoothly as personnel establish appropriate and enduring institutional relationships. Clear up-front planning also ensures that everything necessary is considered and evaluated, with no surprises requiring going "back to the drawing board" and incurring unnecessary costs and delays. Or even worse, creating unwanted but foreseeable environmental and/or community impacts.

H. Myth: More People and Money Working on the Project or Setting Absolute Time Limits Means We Will Get the Project Done on Time

Unfortunately, throwing more people and money at projects to make up for shortening the time period may instead lead to more second-guessing, confusion, miscommunication, and repeat planning. Even worse, potential impacts may not be discovered until construction, such as finding important heritage resources or a hazardous waste site. A well-run planning and environmental review process for even complex projects usually has a core team of no more than four or five people in the primary roles of developing a project review for a federal agency (core team). More important than numbers, time, and money is ensuring that the right people are working together at the right time using a systematic interdisciplinary process with sufficient resources and management support. As for time limits, the CEQ regulations do not identify specific time limits,

11. Memorandum of Understanding Regarding Coordination in Federal Agency Review of Electric Transmission Facilities on Federal Land (Oct. 2009).
12. 5 U.S.C. §§551-559.
13. 36 C.F.R. §251.58.
14. 43 C.F.R. §2804.14.
15. 40 C.F.R. §§1501.2, 1506.1, 1506.5, and 1507.2.
16. 40 C.F.R. §1504.

but do provide many procedural options for eliminating unnecessary paperwork and delay.[17]

I. Myth: It Is Okay for a Contractor to Take on All the Tasks Assigned to Them by a Federal Official or Company Manager

Only a federal employee can perform some tasks that involve agency discretion, even though a federal official or a company manager may have assigned the task to a contractor.

The CEQ regulations make clear that government decisionmakers are responsible for providing detailed guidance to proponents prior to their submission of an application to use federal land. These government officials are ultimately responsible for the scope, content, and decisions to be made regarding authorities related to applications.[18] Agency decisionmakers are also responsible for ensuring that project proponents do not take actions that would have an adverse environmental impact or foreclose reasonable options (exclusive of planning or design actions supporting an application) prior to an agency publicizing its decision.[19]

The Office of Management and Budget (OMB) Policy Letter 11-01[20] states: "It is the policy of the Executive Branch to ensure that government action is taken as a result of informed, independent judgments made by government officials" that ensures that "decisions of significant public interest are made by officials who are ultimately accountable to the President and bound by laws controlling the conduct and performance of Federal employees that are intended to protect or benefit the public and ensure the proper use of funds appropriated by Congress." Agencies must "take special care to retain sufficient management oversight over how contractors are used to support government operations and ensure that Federal employees have the technical skills and expertise needed to maintain control of agency mission and operations."

The policy letter defines "inherently governmental functions" as actions that involve the exercise of discretion by an agency decisionmaker in applying federal government authority, making value judgments in decisionmaking, and determining whether or not to take actions within government authority and jurisdiction. Gathering information and providing expert, innovative, and cost-effective advice, opinions, ideas, and recommendations to federal government personnel are actions the policy letter describes as appropriate contractor work. However, federal government personnel must properly manage and oversee contractor performance and ensure federal government employees perform inherently governmental functions. Although proponents are not government employees, the concepts identified in the policy letter also apply to contractors hired by proponents for environmental compliance support. Company management is fully responsible for the scope and content of information provided to regulators and permitting authorities at all levels of government, as well as interactions with landowners and the public.

Government officials responsible for NEPA compliance often improperly delegate and task inherently governmental functions to contractors, such as the definition of the need for action, objectives, scope of decisions, array of alternatives and issues important for informed decisions, and other procedural requirements. Project proponents and contractors share in the responsibility to ensure that they are not performing inherently governmental functions, even when directed to do so by a federal official. Response to a request for proposal should include clear definitions of government and contractor roles. Clearly understanding appropriate roles for the contractor and government can be a powerful discriminator in the selection of a contractor's response to a request for proposal.

J. Myth: Integrated Planning and Review™, Facilitated Planning™, and Informed Facilitation™ Are Just Fancy Names for a Meeting Facilitator and Team Leader/Project Manager—People We Already Have Available or Can Contract

The processes involved in Facilitated Planning™ and Informed Facilitation™, primary processes involved in Integrated Planning and Review™, are fundamentally different from what usually takes place in managing or facilitating a meeting or leading the interactions of a project team. Informed Facilitators are actually skilled and experienced planners familiar with the proposed action, pertinent science, agency processes and culture, and the underlying legal requirements for approving and operating a proposed project. In partnership with the proponent and/or agency project manager, Informed Facilitators move the planning process forward and provide an unbiased bridge to inform and adapt the strategies and processes from pre-application through project approval. They facilitate the team through the planning process and document results and aid document preparation concurrently with the proponent's and agency's reviews and corrections. Informed Facilitators ensure that all parties acknowledge inherently governmental and proponent managerial functions and operate within their appropriate roles, responsibilities, and authorities.

The authors actually sign a "no conflict of interest" statement regarding the eventual outcome of a proposed project, as we assist as an impartial third party in the process, relationships, and strategies in support of the resulting decision. The "no conflict statement" is applicable to services provided to a project proponent as well as the federal government for a particular project.

17. 40 C.F.R. §§1500.4 and 1500.5.
18. 40 C.F.R. §§1501.2, 1506.1, 1506.5, and 1507.2.
19. 40 C.F.R. §1506.1(a), (b), and (d).
20. 75 Fed. Reg. 16188-94 (Sept. 12, 2011).

II. Fact: Using NEPA as an Integrating Planning Tool Improves Efficiency

A. *Myth: NEPA Is all About Better Documents*

40 C.F.R. §1500.1 states: "It is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action." NEPA documents provide the results of the planning and analysis process so that decisionmakers, the public, interested entities, and even judges can evaluate results and provide informed comments or make informed decisions. Better documents in terms of content, format, and readability are certainly important! But better documents must be based on better planning and analyses, well-communicated, to demonstrate that the responsible federal official took a "hard look" at the consequences of committing to an action that may adversely affect the human environment and has provided clear rationale based on the "hard look" for allowing adverse impacts to occur in order to meet the need for action.

B. *Myth: NEPA Documents Must Be Perfect to Win in Court*

Perfect, "bullet-proof" NEPA documents are realistically impossible and not really needed. Through transparent and effective interdisciplinary planning involving the right people at the right time; preparation and review of NEPA documents concurrently with the progress of planning; and meaningful agency and public engagement, perfect documents are really not necessary. The interactions created based on trusting relationships and good-faith exchanges resolve controversies and avoid litigation. We have found that, regardless of the level of documentation, clear concurrence on, and analysis and articulation of the underlying need for action provides a strong basis for subsequent planning and analyses and provide a credible rationale for action. The planning and analyses must be clear and understandable, follow excellent planning processes, fulfill the requirements of CEQ and agency implementing procedures, and meaningfully involve the right people in a timely manner.

C. *Myth: Project Proponents and Their Contractors Are Responsible for the NEPA Processes and Documents, Defining the Need for Action, the Array of Alternatives, and the Identification of Significant Issues*

Even though a project proponent may pay for the preparation of NEPA documents through cost recovery agreements with the responsible agency(ies), the federal agency is clearly responsible for the scope, content, and decisions to be made for EAs and EISs. These responsibilities are inherently governmental functions as defined by the OMB in Policy Letter 11-01 and as addressed in NEPA and CEQ regulations. Project proponents and contractors may prepare EAs, recommend appropriate document formats, collect field data, conduct impact and feasibility analyses, provide support for EISs, and work directly with federal agencies under proper conflict-of-interest protocols. However, the project proponent or contractors cannot supersede or otherwise replace the inherently governmental functions of federal officials. Likewise, contractors cannot replace the inherently managerial functions of the proponent's decisionmakers and staff.

The primary purpose of an EA per 40 C.F.R. §1508.9(a)(1) is to "briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." An applicant may prepare an EA for use by the federal official per 40 C.F.R. §1506.5(a) and (b). However, an applicant may not prepare an EIS for agency use.[21] Besides providing assistance to the applicant regarding the types of information required and independently evaluating the quality and accuracy of such submitted information, the agency "shall make its own evaluation of the environmental issues and take responsibility for the scope and content of the environmental assessment."[22] The proper execution of inherent governmental functions is as critical for EAs as it is for EISs.

A project proponent can improve the quality and timeliness of federal actions by working with the agency early and often to prepare a high-quality project application while remaining available and engaged to provide needed technical and feasibility information. Proponents and agencies can implement very effective streamlining by internally determining the need for action; objectives; scope of decisions to be made; an outline of the preliminary array of alternatives; and the likely issues (cause-and-effect relationships) to be addressed (the "proposal," as defined in the CEQ regulations at 40 C.F.R. §1508.23, addresses inherently governmental functions in terms of scope, content, and decisions) prior to preparing and issuing a Request for Proposal and Cost Quote. Contractors should not be required to play "guess what the agency is thinking" regarding their proposal, and agencies should not have to play "bring me another rock" in their review of submitted information. As contrasted with current practice on many projects, the resulting relationship of the applicant and the federal agency would be more thoughtful and mature with fewer misunderstandings and less conflict, and the entire process would be more efficient and fundamentally "streamlined."

21. 40 C.F.R. §1506.5.
22. 40 C.F.R. §1507.2.

D. Myth: When a Project Proponent Applies to a Federal Agency to Use Federal Land for Development of a Project, All Interactions and Information Provided to the Agency Must Be Open and Available for Public Review

Not all information from the project proponent is appropriate for public or other agency review, either during or after completion of the decisionmaking process.

Recognizing that perception is reality, it is imperative that the federal government does not in appearance or practice imply that a project proponent has an inside track to gain approval of a proposed project. Yet, it is necessary and appropriate that the project proponent, the most knowledgeable party regarding the purpose, need, and operational and feasibility criteria regarding a project, remain actively engaged throughout project planning and available to address technical and operational criteria, as well as remain a reliable source of needed project information. To safeguard proprietary company information, some information may be withheld from public disclosure as proprietary once an application for land use is accepted for review by the authorizing federal agency.

It is imperative that the overall strategy for integrating project planning and environmental review acknowledge the unique status a project proponent has with respect to the government's consideration of the proponent's proposed use of federal land. With the proper procedures in place, full disclosure and consideration of project environmental impacts can be presented to all interested parties while maintaining the confidentiality of proprietary company information. The key to avoiding any appearance of insider influence or preferential treatment is to develop and agree to a well-reasoned and properly counseled operational protocol to guide the integration of project planning and necessary environmental review. This protocol should also include hiring and managing any NEPA contractors in compliance with 40 C.F.R. §1506.5.

All affected parties should participate in the development of the protocol and its implementation by the project proponent and the applicable federal agency and signed by managers at the appropriate level. Through such formalized procedures, the project proponent can establish and maintain status as a reliable and trusted source of factual project information while the government maintains its necessary objectivity.

E. Myth: All States Have NEPA-Like Requirements That Must Be Met for Projects on Federal Land

No. The following states, in addition to Washington, D.C., and Puerto Rico, have "little NEPA" laws: California, Connecticut, Georgia, Hawaii, Indiana, Massachusetts, Minnesota, Montana, New York, North Carolina, Virginia, Washington, and Wisconsin. These laws typically closely resemble NEPA, and some state courts rely on NEPA decisions as well as their own body of case law for interpreting cases. Some state laws have more substantive requirements than NEPA's procedural requirements, such as the California Environmental Quality Act (CEQA). If you are dealing with a proposed action in a state with a state "little NEPA" law, be certain to follow the requirements of the state law and, whenever possible, integrating those requirements with those of NEPA per 40 C.F.R. §1506.2.

F. Myth: EAs Should Be 15-30 Pages; EISs Should Be No Longer Than 300 Pages

Fifteen to 30 pages for an EA is absolutely NOT a requirement—it is a recommendation in the "CEQ's 40 Most Asked Questions," which was published in 1981, prior to the enactment of many other environmental laws and executive orders. As a streamlining measure, the CEQ regulations strongly recommend integrating the requirements of other environmental review and consultation and state "little NEPA" requirements into the NEPA procedures.[23]

The purpose of an EA is simply to "briefly provide sufficient evidence and analysis for determining whether to prepare an" EIS or EA for the proposed action.[24] Integrating the analytic requirements of other laws and executive orders is in addition to the basic requirement for an EA. Alternatives are required for EAs for "any proposal which involves unresolved conflicts regarding alternative uses of available resources."[25]

If the agency determines that consideration of alternatives in an EA is appropriate for a particular decision, additional analyses for those alternatives are required. Federal courts have determined that detailed impact analyses (the "hard look") are required for both EAs and EISs. The federal agency is responsible for ensuring that it has sufficient analyses for making informed and well-evidenced decisions, regardless of the level of environmental documentation.

As for EISs, the CEQ regulations state: "The text of final environmental impact statements shall normally be less than 150 pages and for proposals of unusual scope or complexity, shall normally be less than 300 pages" (not including appendices).[26] The word "normally" makes this section of the regulations a strong recommendation, not a requirement. However, it is important to remember that focusing the planning and analyses on the clearly articulated need for action and the important issues in terms of cause-and-effect relationships are the primary processes for controlling the length through focusing the analyses and content to provide only the information necessary for an informed decision.

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23. 40 C.F.R. §§1507(a), 1506.4, 1502.25, 1500.2(c), and 1506.2.
24. 40 C.F.R. §1508.9.
25. NEPA §102(2)(E).
26. 40 C.F.R. §1502.7.

G. Myth: EISs Must Follow a Rigid Format to Be Legal

Not at all. The regulations at 40 C.F.R. §1502.10 state: "Agencies shall use a format for environmental impact statements which will encourage good analysis and clear presentation of the alternatives including the proposed action. The following standard format for environmental impact statements should be followed unless the agency determines that there is a compelling reason to do otherwise." Through experience, the standard format, especially separating the affected environment from the environmental consequences, has been found to create encyclopedic and lengthy descriptions of affected environments that is often unrelated to actual impact analyses. (40 C.F.R. §1502.15 states: "Verbose descriptions of the affected environment are themselves no measure of the adequacy of an environmental impact statement.") Using a format that encourages quality analysis and clear communication as the basis for informed decisionmaking and readability is a compelling reason indeed!

H. Myth: EAs Do Not Require the Same Rigorous Impact Analyses as EISs

Actually, an EA may require more rigorous analyses of consequences than an EIS (as well as potentially considering the impacts of alternatives per NEPA §102(2)(E) as changed from the "no action" alternative per CEQ guidance).

The decision whether to prepare a finding of no significant impact (FONSI) or an EIS is called the "threshold" decision. The rationale and evidence for a FONSI must be based on the impact analyses in the EA. Remember, a FONSI allows for adverse impacts; however, those impacts cannot cross a "significant impact" threshold for each resource set by an agency on a case-by-case basis. 40 C.F.R. §1508.27 simply provides general criteria for consideration of significance of adverse impacts; the agency, with review by interested parties and sometimes a court, subjectively sets the threshold for significance of impacts using criteria that the agency finds appropriate based on the analysis documented in the EA. An EIS does not pose a "threshold" decision regarding the significance of impacts; the agency simply declares that a proposed action may have a significant impact when it publishes the NOI, opening the EIS process to the public. Therefore, the impact analyses in an EIS are simply disclosures of comparative impacts among the alternatives as change from the impacts of the "no action" alternative, as required by 40 C.F.R. §1502.14.

I. Myth: An Applicant's Analysis of the Need for Action Should Not Narrow the Scope of an Agency's NEPA Analysis

Federal courts have not been willing to "blindly adopt" an applicant's definition of the need for action as the basis for narrowing an agency's range of alternatives evaluated in a NEPA environmental review. However, agencies must consider alternatives that are consistent with the proponent's purpose and need, and can give substantial weight to the goals and objectives of the private applicant. NEPA requires an agency to "exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project" and to look at the general goal for the project, rather than only those alternatives by which a particular applicant can reach its own specific goals.[27] In the end, however, it makes no sense to evaluate alternatives that are not fully effective in meeting vegetation management standards or transmitting electricity reliably and safely from generation to load.

Proponents are responsible for defining their needs and objectives clearly, supported by evidence and rationale, and proposing at least one reasonable and technically feasible and cost-effective way to meet their objectives. Agencies are responsible for evaluating the justification and reasonableness of the proponent's need within the framework of agency mission, policies, and standards, and working with the proponent to develop other reasonable ways to meet the project need while mitigating impacts. Proponents and agency staff and decisionmakers should work closely and collaboratively during the pre-application and application processes to identify "fatal flaws" and to develop a proposed action and reasonable alternatives that are effective in fulfilling the need for action and yet effective in mitigating adverse impacts.

J. Myth: If There Are Valid Environmental Reasons, an Alternative Studied in Detail Does Not Need to Meet the Need for Action

An alternative that does not meet the need for action to a great degree has no value. Why would anyone waste their time studying an alternative that does not accomplish what is needed while causing unnecessary impacts? The courts have been clear that an alternative (other than the "no action" alternative for projects) must substantially meet the need for action for it to be "reasonable." If the selected alternative does not meet the need, then the agency would probably have to consider additional actions in the future to effectively and fully meet the need. Postponing an action ripe for consideration violates the requirement that the NEPA evaluation consider all

27. E.g., National Parks & Conservation Ass'n v. Bureau of Land Management, 606 F.3d 1058 (9th Cir. 2010); Colorado Environmental Coalition v. Dombeck, 185 F.3d 1162, 1174-75, 29 ELR 21406 (10th Cir. 1999); Van Abbema v. Fornell, 807 F.2d 633, 17 ELR 20429 (7th Cir. 1986); Sierra Club v. Marsh, 714 F. Supp. 539, 20 ELR 20216 (D. Me. 1984); Fuel Safe Wash. v. Federal Energy Regulatory Commission, 389 F.3d 1313 (10th Cir. 2004); Citizens Comm. to Save Our Canyons v. U.S. Forest Serv., 297 F.3d 1012, 32 ELR 20824 (10th Cir. 2002); Environmental Law and Policy Center v. U.S. Nuclear Regulatory Comm., 470 F.3d 676, 683, 36 ELR 20239 (7th Cir. 2006). Daniel R. Mandelker, NEPA Law and Litigation, Thomson Reuters/West, Release 9 (July 2011).

connected actions[28] and associated direct, indirect, and cumulative impacts.[29]

K. *Myth: Calculating and Displaying Quantitative Outputs Is Sufficient to Complete a Proper Disclosure of Environmental Impacts*

Outputs, such as acres of wetlands filled or the increase in air emissions in parts per million, tell the reader nothing about what that number means in terms of impacts to a particular resource, such as losing an important nursery wetlands for a commercial fish species, or the risk of losing forests or fish species due to acid rain from an increased output of sulfur dioxide. In 2004, a U.S. circuit court of appeals judge stated:

> A calculation of the total number of acres in a watershed is a necessary component of a cumulative impact analysis, but it is not a sufficient description of the actual environmental effects that can be expected from logging those acres. . . . Stating the total miles of road to be constructed is similar to merely stating the sum of the acres to be harvested—it is not a description of the *actual* environmental effects.[30]

An impact evaluation must clearly describe what an output change from the baseline/no action alternative *means* to the affected resource. This understanding engages the power of using cause-and-effect relationships to identify relevant issues, as contrasted with using only "topics" such as "endangered species" or "water quality" or causes such as "road density."

L. *Myth: Cumulative Impacts Are Not Required in EAs, and Can Be Simply a List of Past, Present, and Reasonably Foreseeable Future Actions in the Project Area With Subjective Conclusions Displayed in a Separate Chapter or Section of the Environmental Document*

Contrary to some opinions, cumulative impacts[31] are required for EAs as well as for EISs.[32] For some projects, significant cumulative effects may be the tipping point to require preparation of an EIS or development of a new alternative.

A comprehensive listing of past, present, and/or reasonably foreseeable future actions is insufficient to accomplish a credible cumulative impact analysis. It is the additive or synergistic effects of the actions that matter, not the actions themselves. The cumulative impact analysis should include only those actions that actually contribute to a cumulative impact on a resource. If an action makes no contribution to the cumulative impact on one or more resources, then it also has no direct or indirect impact and should not be included in the environmental document at all.

Many resources are already impacted cumulatively in the baseline or "no action" alternative. For example, many wetlands and wetland systems are already cumulatively impacted; populations of endangered or threatened species are in that condition because of many actions and changes that have added up to endangered status. The proposed project and action alternatives just incrementally add to existing cumulative impacts caused by past and present actions.

As many resources are already or could be impacted cumulatively by a combination of past, present, and/or reasonably foreseeable future actions, we recommend that the appropriate impact analyses for each resource be documented in one location in an EA or EIS, rather than separating cumulative impacts from direct and indirect impacts on the resource into another chapter or section of the environmental document. To put it simply, if more than one action identified in the cause-and-effect relationship directly or indirectly impacts a particular resource, the incremental impact is inherently cumulative ("past, present and reasonably foreseeable future actions"[33]). Just "tell the story" of the incremental impacts on each resource as change from the baseline impacts of the no action alternative using cause-and-effect relationships. The approach of "telling the story" focused by cause-and-effect relationships supports "streamlining" and "clear presentation" of the effects of each alternative.

M. *Myth: Agencies Must Select the Alternative With the Fewest Impacts*

Agencies can select any of the alternatives considered in detail, including deciding not to take action at all (formally selecting the "no action" alternative). Some agencies choose to mix and match elements of alternatives in their final decision, but this should be done with caution unless the impacts are considered in detail in the EA and those evaluated impacts can clearly support a FONSI for the selected alternative. This same caution should be used for EISs also.

The purpose of NEPA environmental review is to analyze and disclose impacts so the decisionmakers and the public can make informed and, hopefully, wise decisions. In 1989, the U.S. Supreme Court determined that NEPA is a procedural law,[34] not a substantive law. Therefore, NEPA cannot prohibit a federal official from making a decision that has severe environmental consequences or creates impacts with conflicting scientific agreement, as

28. 40 C.F.R. §1508.25(a)(1).
29. 40 C.F.R. §§1508.7 and 1508.8.
30. Klamath-Siskyou Wildlands Center v. BLM, 387 F.3d 989, 39 ELR 20285 (9th Cir. 2004).
31. 40 C.F.R. §1508.7.
32. *E.g.*, Fritiofson v. Alexander, 772 F.2d 1225, 1243, 1245-46, 15 ELR 21070 (5th Cir. 1985).
33. 40 C.F.R. §1508.7.
34. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 19 ELR 20743 (1989); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 8 ELR 20288 (1978)).

long as the impacts and conflicting views are identified in the EIS with full public disclosure and opportunity to comment, all of which are acknowledged in the decisionmaking process. Of course, for a FONSI, the impacts cannot be significant, but an agency decisionmaker may still make a decision that has adverse, but not significantly adverse, environmental impacts. Under the APA, all decisions documented in a FONSI or record of decision (ROD) and the supporting EA/EIS and administrative record are subject to judicial review.

N. Myth: A FONSI Should Be Short and General

The FONSI is a very important environmental document that clearly describes the rationale for the conclusion that none of the impacts evaluated in the EA for the selected alternative will have a significant effect on the environment. Some agency NEPA procedures allow very short generic FONSIs in their agency procedures. However, FONSIs provide the rationale for why the agency determined that none of the impacts evaluated in the EA (or at least with the selected alternative) would create a significant impact, using the subjective criteria listed in 40 C.F.R. §1508.27. The courts have frequently determined that the burden of proof in a lawsuit for defending the agency-selected level for no significant impacts is on the agency. Because it is inherently difficult to prove a negative ("no significant impacts") while providing reasonable evidence in support of the finding, it is critical to have both a detailed analysis of impacts in the EA and a clear rationale for why those impacts are not significant in the FONSI.

O. Myth: A Federal Court Decision Applies Throughout the Nation and All Federal Agencies Must Follow the Ruling Regardless of Location

Decisions of federal district and courts of appeal are usually restricted to the geographic area over which the specific court has jurisdiction, with district court decisions having a much narrower area of influence. As courts of appeal consider arguments made in decisions by other courts of appeal and consider decisions made by district courts within their jurisdiction, these determinations get wider application within the circuit. Of course, the opposite may happen, where a particular appellate court disagrees with a decision made in another appellate court. Many of the cases appearing before the Supreme Court are the result of conflicting rulings among the appellate courts. It is helpful to know how other courts have ruled on particular cases. However, it is very important that the circumstances of each case are clearly understood before concluding that the ruling has a bearing on a particular project. Good practical legal advice is important, especially involving legal disagreements.

III. Fact: Good-Faith Coordination With Agencies and Tribes and Meaningful Public Engagement Create Efficiency and Positive Enduring Relationships

A. Myth: If People Just Understood More About Energy Generation and Transmission, They Would Not Oppose Projects

Information, well-communicated, is powerful in understanding why a project is necessary. Knowing that a project is needed for the public good is not, however, sufficient to overcome opposition from many people who oppose associated impacts or setting a precedent, or who feel that they are unfairly or unnecessarily burdened with the associated impacts.

B. Myth: Public Hearings and Meetings Are Always Required by NEPA and Must Follow a Prescribed Format

NEPA does not require public hearings or meetings. 40 C.F.R. §1506.6 has only four requirements for agencies:

- Make diligent efforts to involve the public in preparing and implementing their NEPA procedures;
- Provide public notice of NEPA-related hearings, public meetings, and availability of environmental documents so as to inform the persons and agencies who may be interested or affected and, in all cases, mail notice to those who have requested it on an individual action;
- Hold or sponsor public hearings or meetings whenever appropriate; and
- Solicit appropriate information from the public.

Some substantive laws and agency procedures do require formal hearings or public meetings. NEPA does not. If an agency determines that a public meeting or hearing is the most appropriate means to meet the requirements of 40 C.F.R. §1506.6, then public hearings and meetings can follow any number of formats, consistent with agency procedures.

C. Myth: An Open House Format for Public Meetings Is Sufficient for Obtaining Public Comments

Meaningful public engagement strategies must be based on the public involvement objectives the agency is trying to meet and then select processes that meet those objectives. The concern is often that agencies want to avoid public meetings and hearings that provide a platform for angry conflict and grandstanding. Using appropriate strategies and up-front planning with contingencies, public meet-

ings, and hearings can provide a forum where people can hear the thoughtful comments of others and react in a thoughtful way. Public meetings and hearings also allow the agency to systematically provide information in a group forum to assist people in making thoughtful comments.

The open-house format is becoming increasingly popular among agencies striving to avoid grandstanding by some participants. This format, unless combined with others, may limit the ability to:

- Systematically provide consistent information to all interested or affected entities;
- Record comments systematically; and
- Obtain sufficient participation or input needed to properly consider the proposed action and reasonable alternatives.

Many people are interested in what their public servants are proposing to do, but do not have the time to take off work or spend an evening in a meeting. Many agencies are using or combining different methods for outreach, including public hearings, meetings, open houses, notecards, tape recorders, dedicated comment websites, visits to community gatherings, interacting with schools, pre-project outreach, and interactive and managed internet technologies. Again, clearly identify your public and agency engagement objectives and select effective strategies to meet those objectives in a site-specific manner.

D. Myth: Writing a Consultation Letter to a Tribe Can Satisfy the Requirement for Government-to-Government Consultation

A quote from Derek C. Haskew, Managing Attorney, DNA—People's Legal Services, Inc., Halchita, Navajo Nation, 2000[35]: "It is difficult to avoid the conclusion that 'consultation' is the latest federal code word for 'lip service'." The same author states: "Consultation is part of the conventional 'hard-look' and it is a huge part of the Indian hard-look." He quotes the U.S. Environmental Protection Agency Tribal Consultation Guide[36]: Government-to-government consultation involves a

> consultation process between the federal and tribal government peers [note: the elected government official] that seeks to reach a consensus on how to proceed. . . . Moreover, in some instances specific requirements demand the federal government give special deference to tribal preferences. . . . Certain basic guiding principles should be followed: (1) Tribal governments should be involved in the actual decision making process at the earliest practicable moment; (2) Each agency should institutionalize its own consultation procedures for Indian governments; (3) Federal agencies should train their staff on how to consult with Indian governments; and (4) Integrity and honesty should always be paramount in the consultation process.

E. Myth: Active Involvement of a Staff Member of a Tribal Government Is the Same as Consulting With the Tribal Government

Any engagement that involves an initial contact, decision, or agreement between the federal agency and a tribal government must be made with the elected tribal official having the appropriate authority. Agreements made with staff have no formal authority and can cause serious problems and delays if the tribal government disagrees, with high potential for decreasing trust and the quality of long-term relationships.

F. Myth: Proponent and/or Agency Contractors Are Responsible for Public Involvement and Coordinating With Federal Agencies and Tribes

Contractors are important support personnel temporarily hired by the project proponent or the government for skilled assistance. They are never responsible for inherently governmental functions or communicating as a representative for the project proponent or the government with agencies, nongovernmental organizations, and the public in person or in writing. Also, a project proponent should never represent himself or herself as speaking for the government. Contractors for the project proponent or the government are to only provide internal support services as defined by the contract statement of work.

IV. Conclusion

Don't hesitate to use the intelligent powers of NEPA and agency and public engagement for streamlining planning. In our experience, if a recommended process does not make sense or its implementation is like "pushing a rope," that process probably involves a "myth." Engage the right people at the right time with quality planning to get the right results. Question and investigate assumptions, processes, application of laws and regulations, and always take the time to do things right the first time. Provide contingencies throughout, as good planning and NEPA may take a different direction than you originally planned. NEPA procedures are highly flexible and adaptable, and proponents and agencies have the power to make NEPA work for everyone to "fulfill the responsibilities of each generation as a trustee of the environment for succeeding generations."[37]

35. Environmental Law in Indian Country, W.H. Rodgers Jr. §1.8, Thomson/West (2005).
36. U.S. Environmental Protection Agency, Guide on Consultation and Collaboration With Indian Tribal Governments and the Public Participation of Indigenous Groups on Tribal Members in Environmental Decision Making (2000).
37. NEPA §101.