

PERSPECTIVES FROM THE FIELD

NEPA Myths: Things We Tell Ourselves about NEPA That Aren't Necessarily True

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After the *mistakes* I discussed in *Environmental Practice* 12(2), and the *gaps* I discussed in *Environmental Practice* 12(3), it may be useful to look at *myths* that have grown around the National Environmental Policy Act (NEPA) process. *Myths* can be defined, as the title suggests, as things we say and believe about NEPA and the NEPA process that are not necessarily true.

Myths can be harmful when they obscure the truth, frighten us needlessly, or embolden us foolishly. Myths can be helpful because they are usually easily to remember and can conform our behavior in intended ways. On the whole, though, we are no doubt better off proceeding under the facts and the law than under myth.

Every myth starts with a kernel of truth, or with a kernel that sounds plausibly true. Every myth meets its end when exposed to the light of fact and law.

An EA/FONSI Is Easier to Prepare Than an EIS

This myth is one of the longest running and perhaps the most deeply ingrained. It holds that in a given situation an environmental assessment (EA)—plus the finding of no significant impact (FONSI) that inevitably follows—is faster, easier, and cheaper than an environmental impact statement (EIS) would be. It is true that EAs tend to be prepared on smaller, cleaner projects involving fewer issues, meaning

they are often smaller and for that reason are easier to prepare than EISs. EAs are supposed to be limited to 15 pages [Q&A, Question 36a, How long and detailed must an environmental assessment (EA) be?], whereas EISs are supposed to be limited to 150 pages (40 CFR 1502.7).¹ EAs often are signed and published locally, whereas EISs may have to go to a higher-level office for approval or even an office in Washington, DC, making an EIS process more time-consuming. And of course the EIS process includes a Notice of Intent and Notice of Availability in the *Federal Register*, something that is much more rare with an EA/FONSI. The myth is that in a given situation an EIS is more difficult. In fact, EAs and EISs are prepared with roughly equivalent rigor in today's practice. Both consider alternative actions to meet a need for action, both give the comparison of alternatives a hard look, both must be analytical and science based, both may incorporate the same mitigation in order to achieve environmental standards, and both are often prepared with the same table of contents. But the EA goes one step farther with the FONSI. An EA/FONSI not only has to disclose and compare the environmental consequences, the same as for an EIS, it also has to find them to be nonsignificant. The fact is that two jobs are harder than one job. When encountering this myth, recite the advantages of an EIS: you won't have to find the environmental consequences to be not significant; you could actually take action with significant consequences; and you won't be appealed or sued for not preparing an EIS.

The EA and EIS Represent Levels of NEPA Analysis

This myth is related to the aforementioned one. It holds that an EIS is the highest level of analysis, which is somehow more vigorous and robust—and thus more lengthy—than others. EAs require only a lower level of analysis, according to this myth, implying that it would take

less time and energy and fewer pages to analyze the effects of the same proposed action in an EA than it would in an EIS. A categorical exclusion (CatEx) would be the lowest level of analysis, again implying still less time and energy. All of this is a myth because there are no levels. Whether the NEPA document is a CatEx, an EA, or an EIS, administrative law requires a hard look at environmental consequences. Findings must be supported by a rational connection between the facts found and the choice made. Administrative law does not acknowledge levels of analysis because every decision, no matter which NEPA process is used, must be based on all relevant considerations and must pass the same arbitrary and capricious test. It is true that CatExes and EAs tend to be prepared on smaller, less complicated projects involving fewer issues, meaning the task is usually easier than for EISs. But there are no levels. Every final agency action—whether processed through a CatEx, an EA, or EIS—must pass the same arbitrary and capricious test for adequacy.

Every EA and EIS Must Have a Range of Alternatives

Alternatives do not always come in a *range*, implying a sweep of options—for example, from zero to 100%, or 180° north to 180° south. Sometimes the choices are simply yes and no. Sometimes only one option works, while other options are prohibitively expensive or more environmentally degrading, meaning the range becomes action and no action. This myth holds that there is always a sweep of options, but not every decision-making situation admits a range of options and—above all else—the NEPA process should inform the decision-making process. This myth is sometimes expressed as a concept of *bracketing* the proposed action by larger and smaller versions of the proposal, thus creating a range of smaller through larger versions of the proposal. The source of this myth is the NEPA regulations, which mention the

word *range* three times, though never as a requirement—only as a descriptor of the alternatives. Sometimes a range of reasonable options is available to the decision maker, and when that is the situation the NEPA document must of course include the range. When encountering this myth, check to ensure that every alternative would respond to the underlying need for action. If there is a need for one thing, it makes no sense to look at doing other things—whether or not they make up a range, whether or not they bracket the proposed action.

An EA or EIS Must Have More Than Two Action Alternatives

This myth is related to the aforementioned one. Sometimes an EA or EIS includes only two alternatives: action and no action. Sometimes these are the only two that make sense. The myth is that two are not enough, no matter what. There is yet to be a published court opinion, however, holding a two-alternative EA or EIS to be inadequate for this reason alone. The NEPA regulations make the comparison of alternatives the “heart” of the NEPA process (40 CFR 1502.14), elevating the importance of alternatives in the process. Agencies do not always lay an adequate foundation for why there are only two alternatives, inviting skepticism. Above all else, NEPA documents should be prepared to inform decision making. When an agency has already derived and proposed the single best solution, nothing useful is gained by developing alternatives that are worse. Sometimes two are enough.

The Purpose of a Project Can Be Stated So Narrowly as to Define Reasonable Alternatives Out of Existence

An agency only has to consider alternatives that meet a stated goal or objective or purpose (also called “purpose and need” or underlying need). By definition, any alternative that does not meet that goal or objective or purpose should be omitted from serious consideration. This myth holds that the goal or objective can be stated so narrowly as to leave out reasonable alternatives. This is a myth because this is impossible. Once the goal or purpose is stated and proved, what is or is not a reasonable alternative will be

defined by that goal or purpose—no matter how narrow or broad. What the perpetrators of this myth most likely intend is that the underlying goal or objective cannot be so narrowly defined as to be unreasonable. This calls for the giving of reasons. If the goal or objective is reasonable—which is to say, if it is supported by reasons—even though it is narrow, it should be sustained because it is not categorically unreasonable for an agency to pursue narrow goals. Agencies should simply show the match between a reasonable goal and reasonable ways to meet that goal. If there is a match, then both will likely seem reasonable. If the goal is bigger than the number of alternatives, it will more likely appear that reasonable alternatives have been omitted. And if the alternatives are bigger than the goal, it will more likely appear that the goal is not reasonably stated—inviting further scrutiny.

Purpose-and-Need Is a Unitary Concept: It Means One Thing

The phrase *purpose and need* is almost universally used as a synonym for the single words goal, purpose, or objective. This perpetrates the myth. Check the dictionary. *Purpose* and *need* are different words with different meanings. The NEPA process itself mandates a double-winning decision-making process, where agencies must first winnow the number of alternatives that are analyzed and compared in the EA or EIS and then choose one among them at the time of decision. This double-winning decision making obviously requires a double set of criteria. The two words purpose and need could have been the foundation for that double winnowing. First, the agency would analyze and compare only those alternatives that satisfy the underlying *need* for action. Second, at the time of decision, the agency would select the single alternative that best satisfies the agency’s additional *purposes*. This myth exists probably because the NEPA regulations do not satisfactorily distinguish needs from purposes: they refer to a purpose and need in an EIS (40 CFR 1502.13), but only to a need in an EA (40 CFR 1508.9). The recommended format includes a “purpose of and need for action” (40 CFR 1502.7), which is then explained as “the underlying purpose and need” (40 CFR 1502.13). To overcome this myth, agencies would have to break up

this phrase into its two component words. An EA or EIS should set forth the reasons for why some alternatives are included whereas others are not. Those that satisfy the need for action are included. An EA or EIS should set forth the basis for the reasons why one alternative will be selected at the end of the NEPA process—those additional purposes the agency wishes to meet while meeting the underlying need for action.

Every alternative must be given equal consideration

It is a myth, though often repeated, that equality is a requirement. What there is, is a requirement for comparison [40 CFR 1502.14: an EIS “should present the environmental impacts of the proposal and the alternatives in comparative form”; 40 CFR 1502.14(b): “Devote substantial treatment to each alternative considered in detail . . . so that reviewers may evaluate their comparative merits”]. So long as the comparison of alternatives is reasonable, the letter and spirit of NEPA are met. Comparison is almost always presented in a table format. The comparison is done if the reader can readily grasp the differences and similarities, the pros and cons. In some situations, alternatives will be ranked from those most likely to be selected to those less likely. It is reasonable that alternatives less likely to be selected should be analyzed with less enthusiasm and at less cost, so long as the comparison is done.

There are three types of impacts: Direct, indirect, and cumulative

This myth stems directly from the definition of *scope* in the NEPA regulations, which says there are 3 types of impacts: “direct, indirect, cumulative” [40 CFR 1508.27(c)]. The myth is that these are three *different* types. The adjective *cumulative* does not distinguish one kind of environmental consequence from another. According to the dictionary, to be cumulative is to be incremental. Every environmental consequence is an increment, or it would not be a consequence at all. Every environmental consequence is also direct—directly following its cause. Thus the world of environmental consequences cannot successfully be segregated

into these three kinds because they are all direct and they are all cumulatives. In addition, some are indirects. To deal with this myth, remember that even though the NEPA regulations define three types of impacts, the regulations never require the actual labeling of the environmental consequences in EAs and EISs. These adjectives are not absolutely necessary for successful compliance. Skip the labels, to see if it makes any difference to the environmental analysis in an EA or EIS. It typically will not, because it is the environmental consequence that is of interest, not its characterization as direct, indirect, or cumulative.

A Draft EIS Need Not Be a Complete EIS

The myth is that “We can fix it in the final.” But a *draft* EIS is supposed to meet all the requirements of a *final* EIS [40 CFR 1502.9(a)]. Very few things can be added or changed in a final EIS [40 CFR 1503.4(a)]. A supplemental draft EIS is required if anything “substantial” or “significant” is omitted from the draft [40 CFR 1502.9(c)]. A draft EIS is to be reviewed and commented upon, but it is a draft in name only. The word *draft* in its ordinary sense means something that is not finished—it is preliminary or partial—whereas a draft EIS is supposed to be finished so that the review and comment process is meaningful. Some few things can, indeed, be fixed in the final. But a broken or incomplete draft EIS cannot be fixed without a revision or supplement. Be aware of the limits of what can be changed after the draft is published.

Every Federal Action Either Is Categorically Excluded or Is the Subject of an EA or EIS

The myth is that the NEPA regulations apply to and cover all federal actions. On point, the regulations divide the world of federal actions into three categories: (1) those actions that normally require an EIS [40 CFR 1501.4(a)(1)], (2) those actions that normally require neither an EA nor an EIS—those that are CatEx [40 CFR 1501.4(a)(2)], and (3) those actions that do not fit into either of those categories and

for which an environmental assessment must be prepared [40 CFR 1501.4(b)]. Yet we know that federal agencies in quite a number of instances took an action, had not prepared a CatEx, EA, or EIS—were sued for not complying with NEPA—and won. These cases reveal to us that there is another world of federal actions that is simply outside the ambit of NEPA and the NEPA regulations. These are actions that safely can be taken without any NEPA procedure whatsoever. To deal with the myth, get to know all the good legal reasons a federal action might fall outside the ambit of NEPA.

The FONSI Is a *Finding*

The NEPA regulations call the FONSI document a *finding* (40 CFR 1508.13), even though the document makes up only part of what is known in administrative law as a finding. The EA typically contains the evidence and analysis, whereas the FONSI typically contains the ultimate conclusion about significance and reasons that support the ultimate conclusion. Together, both the document called EA and the document called FONSI make up the necessary elements of what is known in administrative law as a *finding*. Curiously, the NEPA regulations provide that a FONSI “shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it. If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference” (40 CFR 1508.13). Once the FONSI attaches the EA or includes a summary of the EA, there is no good reason why the entire amalgamation together should not be called the finding. This would make the second document, the FONSI, superfluous. Call the whole thing—the EA plus the FONSI—a FONSI. And be done with it.

Every FONSI Should Recite the 10 Elements of 40 CFR 1508.27(b)

The myth is that these 10 elements are the definitive list of significance factors that could be relevant to a FONSI. Thus we sometimes see FONSI in a bullet format patterned after these 10 elements. But the

list was not meant to be exhaustive (“the following should be considered”). The list would be more relevant to the preparation of an EA, where consequences in these 10 categories could be analyzed, than to a FONSI, where reasons for nonsignificance of the effects in the EA are to be given. The list says nothing about relevance, and above all else the EA should focus on relevant consequences. The list says nothing about the scope of the EA, and the scope of the FONSI should exactly follow the scope of the EA. A FONSI should recount every adverse environmental consequence from the EA and give reasons why each and every adverse environmental consequence is not significant—making this list irrelevant to the document called FONSI.

One federal action gets one NEPA document

The perpetuation of this myth is hard to understand given the NEPA regulations on scoping and tiering. Agencies are supposed to focus only on those decisions that are ripe for decision making by tiering their NEPA documents (40 CFR 1502.20 and 1508.28). *Scoping* is a way to focus on only those things that directly bear on the decisions to be made (40 CFR 1501.7). This lays the groundwork for multiple NEPA documents staged over time, even for a single federal project. Federal actions can be more complicated than what reasonably can be captured in a single NEPA document, such as when an action is to be implemented in phases over a period of time. Sometimes early decisions must be made about equipment or location or strategy, later decisions will be made about design or features, and still later decisions are to be made about site-specific elements having to do with design or mitigation. Despite the complexity of some federal actions, especially large projects, most are nevertheless compressed into a single EA/FONSI or single EIS. Be open to the possibility that it may be easier in the long run to divide up the NEPA process into the same number of phases or tiers as the decision making really requires. Care must be taken not to drop elements of the action and not to overlook at any point the relevant consequences of all parts.

Segmentation Is bad

No one has been known to lose a NEPA case by throwing too many actions into an EA or EIS, but agencies have lost cases by not including enough. Thus, *segmentation*—dividing large projects into smaller parts or leaving out allegedly connected or cumulative or similar actions—can be dangerous. The myth is, “When in doubt, throw it in.” For example, two sections of a highway widening might be said to be connected or cumulative or similar and should be analyzed in the same EA or EIS. Unless of course the two sections have independent utility, or the earlier is tiered to the later, or there are other good reasons to prepare a separate EA or EIS (or supplement) for each. The key to understanding NEPA is to reasonably inform the federal decision, which is sometimes better accomplished by dividing large projects into more sensible parts and focusing on the parts ready for decision making. The NEPA regulations seem to favor inclusiveness: scope consists of connected, cumulative, and similar actions [40 CFR 1508.25 (a)]; significance “cannot be avoided” by breaking an action “down into small component parts”; and actions “which are related to each other closely enough . . . shall be evaluated in a single impact statement [40 CFR 1502.4(a)]. Yet, the regulations explicitly provide for tiering “to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe” (40 CFR 1508.28). When in doubt, figure it out. Independent utility and tiering are just two of the good legal reasons for splitting large projects into more manageable parts. So long as the federal decision is reasonably informed, segmentation is proper. And if it enhances the decision-making process, segmentation is good.

The phrase “the NEPA decision”

NEPA requires no decision and authorizes no decision. NEPA doesn’t even mention a decision. NEPA refers to a proposal for federal action, and the “detailed statement” is to accompany a “report or recommendation on a proposal.” Yet we often hear in ordinary parlance the phrase “the NEPA decision” to refer to the point in time following the NEPA process where the decision is made. True enough, if the

NEPA process is an EIS, the decision must be recorded in a Record of Decision (ROD). Some agencies provide for a formal record of the decision following an EA/FONSI and even some for CatExes. None of these are a *NEPA decision*. All decisions are made under authorizing agency legislation, which is different for every agency and sometimes differs within an agency, depending on the nature of the decision. This phrase is a myth because all *NEPA decisions* actually are made under statutes other than NEPA, although the decision may be recorded in a ROD or similar document. Corollary myths: the NEPA proposal, the NEPA alternatives, the NEPA impacts, etc. There is no such thing as a NEPA decision. Interpret this to mean the decision that is made by the agency under its authorizing legislation subsequent to the NEPA process. A final caution: the phrase “the NEPA decision” invites the question of whether there is *another* decision, or *another* decision point. Perhaps the *real* decision? Perhaps the *NEPA* decision is recorded at the end of the NEPA process, but the *real* decision is made at another time?

Any use of the word full or fully

It is said that the impacts must be fully disclosed, or that the NEPA document is a full-disclosure document, or that we must conduct a full analysis—presumably one that fully discloses the effects of the full range of alternatives so that we are fully informed after obtaining a full range of comments from the full range of interested and affected persons. An EA is perhaps rough cut and low budget, but a full-blown EIS is said to fully disclose the environmental consequences. This is a myth because there is no requirement for a full anything. Actions must be given a hard look, not a full look. Alternatives must be present if reasonable. The conclusions in an EA/FONSI or EIS must stand up to the arbitrary and capricious test—which is basically the same as disclosing a rational basis for the conclusion. There is no proper legal standard with the word *full* in it. Trying for full compliance has perhaps led to the problem of the bloated, overinclusive, expensive, and hard-to-read NEPA documents we sometimes see. Corollary myths: more is better, when in doubt throw it in, and anything described as

complete or full blown such as a full-blown EIS. When in doubt, figure it out. In close cases, make a finding whether an action, alternative, or consequence should be included. If not included, the finding will support its exclusion. Any element of scope that is not included in the NEPA document, and left out without explicit reasons, is vulnerable.

It’s getting harder and harder to get it right

This is the myth of ever-rising expectations. But the rule of reason has been a legal standard in administrative law for over a hundred years. All NEPA cases are Administrative Procedure Act (APA) cases, and the APA has been with us essentially unchanged since 1946. NEPA is essentially unchanged since it became law in 1970. The “hard look” standard has been around nearly as long. The NEPA regulations are unchanged (with one small exception) since they became applicable in 1979—which covers the careers of almost all of us. Some of the recent NEPA lawsuits may have become more esoteric. Plaintiffs may be getting smarter. The bar isn’t rising, necessarily, but that doesn’t mean the agencies are getting closer to surpassing it. Focus on that part of it.

Note

1. Council on Environmental Quality (CEQ) (2005). Hereafter CFRs are cited in the text.

Reference

Council on Environmental Quality (CEQ). 2005. *Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act*. 40 CFR 1500–1508. CEQ, Washington, DC, 42 pp. Available at http://gc.energy.gov/NEPA/nepa_documents/TOOLS/GUIDANCE/Volume1/3-ceqregs-booklet.pdf (accessed April 27, 2011).

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