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Constructing Effective Comments Under NEPA

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What is NEPA?

- ▶ The National Environmental Policy Act (NEPA) requires a federal agency to prepare a detailed statement of effects for *major Federal actions significantly affecting the quality of the human environment*.
- ▶ Under NEPA, agencies must consider the alternatives to their actions.
- ▶ Agencies are directed to use an interdisciplinary process for developing alternatives and considering affects.
- ▶ Agencies must engage the public in the NEPA process, and respond to written comments received on their NEPA analysis.
- ▶ The NEPA document is supposed to be concise, written in plain English, and enable the reader to determine what actions are being considered and the impacts of those actions.



What is an Environmental Impact Statement?

- ▶ There are three possible documents that result from a NEPA review:
 - ▶ Categorical Exclusion (CE)
 - ▶ Environmental Assessment (EA) (and Finding of No Significant Impact (FONSI))
 - ▶ Environmental Impact Statement (EIS)
- ▶ An EIS is used for projects that may have a significant impact on the environment.



What are the Key Elements of an EIS?

- ▶ Purpose and Need
- ▶ Alternatives (Including a Preferred Alternative)
 - ▶ No Action Alternative
 - ▶ Reasonable Alternatives, even those outside the jurisdiction of the agency
 - ▶ Preferred Alternative
- ▶ Affected Environment
- ▶ Environmental Consequences
 - ▶ Indirect and Direct Effects
 - ▶ Cumulative Effects
 - ▶ Mitigation



How Do I Effectively Structure Comments on an EIS?

- ▶ Use Headings
 - ▶ Go section by section, and use descriptive headings.
 - ▶ For example, "The EIS underestimated the effects of the action alternatives on local communities."
- ▶ Focus on cause and effect
 - ▶ If you allege that the EIS does or does not do something, clearly connect the dots.
 - ▶ For example, "The EIS underestimated the effects of the action alternatives on local communities because it failed to account for local investment in farmland. On my farm alone, I have invested over \$_____ in improvements and structures that would be impacted by the transmission line. The EIS does not account for these impacts."
- ▶ Provide as Much Factual Support as Possible.
 - ▶ If you have support for your statement, cite to it! Whether it's news articles, scientific articles, or statements you've heard made by agency staff or others.



- ▶ The more factual support you can provide, the more seriously your comments will be taken.
- ▶ **Point out Inadequacies.**
 - ▶ Point out areas where the EIS is not clear or is missing necessary information. State clearly that you were not able to analyze potential impacts of the decision due to the lack of information.
- ▶ **Focus on Environmental and Economic Impacts Separately.**
 - ▶ While the agencies are directed to consider the economic impacts of their decisions, environmental impacts tend to weigh more heavily in a NEPA analysis.
 - ▶ However, economic impacts are important and should be stated up front and clearly.
 - ▶ Environmental impacts should be separately addressed, and should contain as much support as possible from outside studies, anecdotal experience, or other reliable sources (more on this to come...)
- ▶ Do not rant.



6.9.2.1 Substantive Comments

Substantive comments do one or more of the following:

- question, with reasonable basis, the accuracy of information in the EIS or EA.
- question, with reasonable basis, the adequacy of, methodology for, or assumptions used for the environmental analysis.

- present information or comments that meet the criteria above.
- present reasonable alternatives other than those analyzed in the EIS or EA.
- request changes or modifications in one or more of the alternatives.

Comments that are not considered substantive include the following:

- comments in favor of or against the proposed action or alternatives without reasons that meet the criteria listed above (such as “we disagree with Alternative Two and believe the BLM should select Alternative Three”).
- comments that only agree or disagree with BLM policy or resource decisions without justification or supporting data that meet the criteria listed above (such as “more grazing should be permitted”).
- comments that don’t pertain to the project area or the project (such as “the government should eliminate all dams,” when the project is about a grazing permit).
- comments that take the form of vague, open-ended questions.

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[Examples of substantive comments can be found in the Web Guide.](#)



Draft Comments with Minimal Time

- ▶ If you do not have time to read the whole draft EIS (and who does?), try to focus on the key pieces:
 - ▶ Those are usually the alternatives evaluated and the discussion of effects.
 - ▶ Reviewing the attached maps can help you hone in on impacts to your property under each alternative.
- ▶ Review comments made by others (work in coalitions), and if their comments are relevant to you, incorporate them into your letter.
 - ▶ At a minimum, if you've heard or are worried about a project having a specific impact on you, write a comment letter explaining your concerns (i.e. "I have heard that the project will make it impossible for me to maintain my irrigation structures") and then explain your proposed solution or alternative ("Given the impact the loss of my irrigation structures would have on my operation, I would like to see more of the project sited on federal land. I believe that any environmental or habitat impacts can be mitigated because _____, and it would avoid irreparable economic loss to my operations.")



Section by Section Analysis: Purpose and Need

- ▶ While the regulations treat purpose and need as synonymous, the purpose is usually thought of as the goal or objective to be reached, while the need is the problem the agency is trying to solve.
- ▶ The purpose and need serve as the framework for the alternatives analysis.
- ▶ The purpose and need must be the agency's purpose and need for the project, not the applicant's.
 - ▶ The agency's need can be tied to its responsibilities under existing law (i.e. FLPMA) to respond to a request for a specific project, such as access or grant of a right of way.
- ▶ For an alternative to be "reasonable," it must respond to the purpose and need for the project.



Addressing Purpose and Need

- ▶ Has the agency stated their purpose and need for the project? Has the applicant demonstrated a need?
- ▶ If another entity (state or federal) has found there is a need, do you have issues with that determination?
- ▶ Is the scope of the purpose and need proper? If the purpose and need are too narrow, it will unduly constrain range of alternatives considered by the agency.
- ▶ If you have issues with the purpose and need, clearly state your issue, and provide supporting argument.
- ▶ For example "There is no need for this project because _____."
- ▶ Usually, the agency's need will be limited to its duty to manage its resources in a specific manner.
 - ▶ For example, BLM manages its land to achieve multiple use objectives. However, if the overall economic burden and burden on other uses is high and the applicant's need is low, that could tip the scales in favor of the no action alternative.



Alternatives

- ▶ No Action Alternative (deny application)
 - ▶ Provides a baseline for evaluating environmental consequences
 - ▶ Demonstrates the consequences of not meeting the purpose and need.
- ▶ Action Alternatives
 - ▶ Preferred Alternative
 - ▶ Other Reasonable Alternatives.
 - ▶ Reasonable alternatives are those that are practical and feasible from the economic and technical standpoint (using common sense), not those preferred by the applicant.
- ▶ Can consider alternatives that are outside the agency's jurisdiction.



Addressing Alternatives

- ▶ Did the agency include a preferred alternative? Did the agency include a no action alternative?
- ▶ Were there important practical and feasible alternatives the agency did not include?
 - ▶ If so, set them out in as much detail as possible, including why they are practical and feasible, and noting (if applicable) the differences in economic and environmental burden from your suggested alternative.
 - ▶ For example: "The agency failed to consider an alternative that would have placed the transmission line more significantly on BLM property/on existing right of ways/etc. Placing the transmission line ____ would be practical because _____. It would also be feasible because _____. The cumulative impact of this siting would be less because it would have less economic impact on neighboring owners, while any concerns regarding habitat impacts - if they exist - could be addressed through mitigation.



Affected Environment

- ▶ Describes the existing condition and trend of the environmental attributes that could be impacted by the proposed action or alternatives.
- ▶ For purposes of the affected environment and environmental consequences section, environment includes the broad biological, physical, social, and economic elements of the environment.



Environmental Consequences

- ▶ Effects can be ecological, aesthetic, cultural, economic, social, or health related.
- ▶ The EIS should analyze long-term and short-term effects, and beneficial as well as detrimental effects.
- ▶ The agency should use "best available science" and give a preference to science that is peer-reviewed over that which is not.
- ▶ Should describe methodology and assumptions used to develop effects analysis in a manner that is easy for the reader to understand.



Direct and Indirect Effects

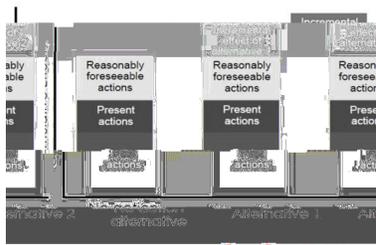
- ▶ Direct and Indirect Effects
 - ▶ Direct effects are those caused by the action that take place in the same time and place.
 - ▶ Indirect effects are those caused by the action, but that are removed from the action in either time or place, but are still reasonable foreseeable.
- ▶ If a portion of the project does not require federal approval, but federal approval has the potential to impact the other portions of the project, the direct and indirect effects that could be influenced by the agency decision should be considered.
- ▶ Since it can be hard to tell if an effect is direct or indirect, the agency does not have to distinguish between them, and may consider them together in an EIS.

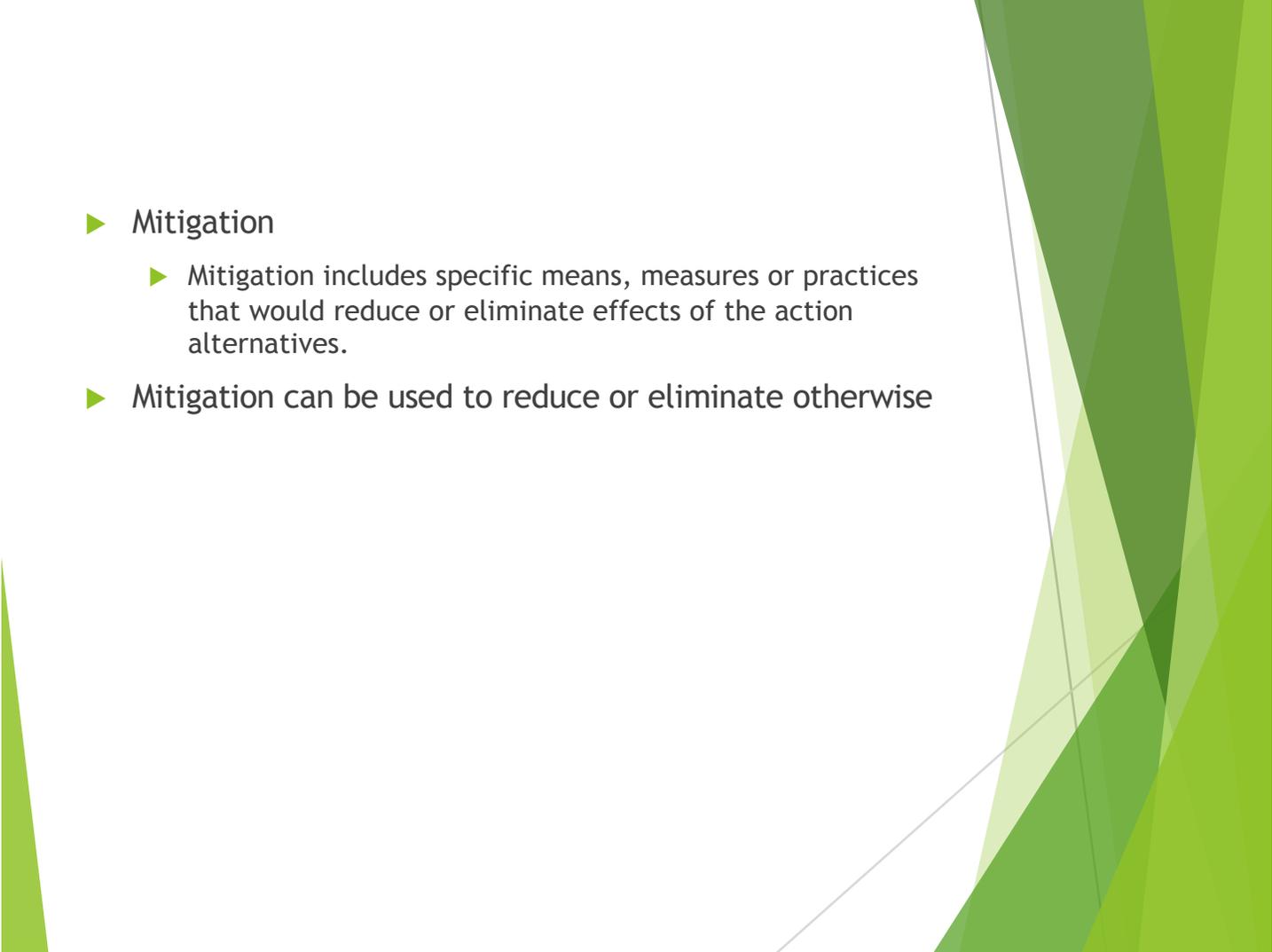


Cumulative Effects

► Cumulative Effects

- Cumulative effects are the impact on the environment which results from the incremental impact of the action when added to other reasonably foreseeable impacts, whether they are the result of federal or non-federal action.
- Takes into account the entire impact of the proposed project. If the non-federal components have the potential to have a cumulative effect when combined with the federal component, then all components of the project must be considered.
- Pay attention to the geographic scope and timeframe used to engage in the cumulative effects analysis.





- ▶ **Mitigation**

- ▶ Mitigation includes specific means, measures or practices that would reduce or eliminate effects of the action alternatives.

- ▶ Mitigation can be used to reduce or eliminate otherwise

Addressing Affected Environment and Environmental Consequences

- ▶ Did the agency currently identify the current state of the area (baseline)?
- ▶ Are there direct or indirect effects that the agency did not analyze?
- ▶ Are the cumulative effects that the agency did not consider or that the agency underestimated?
- ▶ Did the agency consider all possible mitigation in all alternatives?



- ▶ If you feel there were any pieces that were not considered or that the agency got wrong, clearly state them.
- ▶ Don't forget mitigation!
- ▶ For example, if you think there were cumulative effects that are missing or undervalued, and other effects that were given too much weight or for which mitigation was not adequately addressed, this is where you want to address it.
- ▶ "The agency's effect analysis was incomplete.
 - ▶ First, the agency undervalued the cumulative socioeconomic impacts of the project on neighboring communities. The EIS states that _____. However, my experience/local data suggests that the actual impact is _____.
 - ▶ Additionally, the agency failed to consider whether the environmental impacts of the project on federal land could be better mitigated. The EIS states that the project will adversely impact sage-grouse habitat. However, there are effective mitigation measures that should have been included. Those include _____."



Can the Agency Modify the EIS Based on Comments?

- ▶ The agency can make changes to the EIS to address comments that raise concerns or issues not addressed in the EIS or to clarify the EIS.
- ▶ The agency can prepare a supplemental EIS if necessary.
 - ▶ For example, BLM's handbook states that if the comments to an EIS analyzing a new transmission line suggest that an entirely new route would be a reasonable alternative, the agency can prepare a supplemental EIS to analyze the impacts of the new proposed route.
- ▶ A supplemental EIS is required when there are substantial changes to the project, or significant new information or circumstances that were not within the range of impacts analyzed.
- ▶ A supplemental EIS must go through the same process as the EIS (i.e. new public comment, supplemental ROD)



What Happens After I Comment?

- ▶ The agency is required to review and respond to all comments received on an EIS (the response can be by category and can aggregate similar comments)
- ▶ Once the agency finalizes the draft EIS, it will issue a final EIS and a Record of Decision (ROD).



What if I Want to Appeal?

- ▶ Any party wishing to appeal the decision must follow the appeal procedures outlined in the ROD.
 - ▶ The agency will set the deadline to appeal, which is often as short as 30 days from the date of the final decision.
 - ▶ If you wish to appeal the final decision, you would be well-served to consult an attorney, as the appeal process can be legally and procedurally complex.
- ▶ Issues on appeal are generally limited to those raised in your comments, so if you think you want to appeal, it is important to make sure your comments set forth all of your issues!
- ▶ If you want to draft a comment letter that will set you up to appeal the decision, it is a good idea to have an attorney help you draft the comment letter.



What is the agency's burden to show they are right?

- ▶ If the agency's determination about the nature or scope of its NEPA analysis is challenged, the agency is granted some deference to its determination.
- ▶ To overturn an agency's decision, a court would have to find that the agency's determination was "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law."
 - ▶ An agency has significant discretion when evaluating science within its area of expertise.
- ▶ Because the agency has deference in its decision-making, it is always best to try to work with the agency during the draft EIS process to ensure that your issues are addressed, if possible.

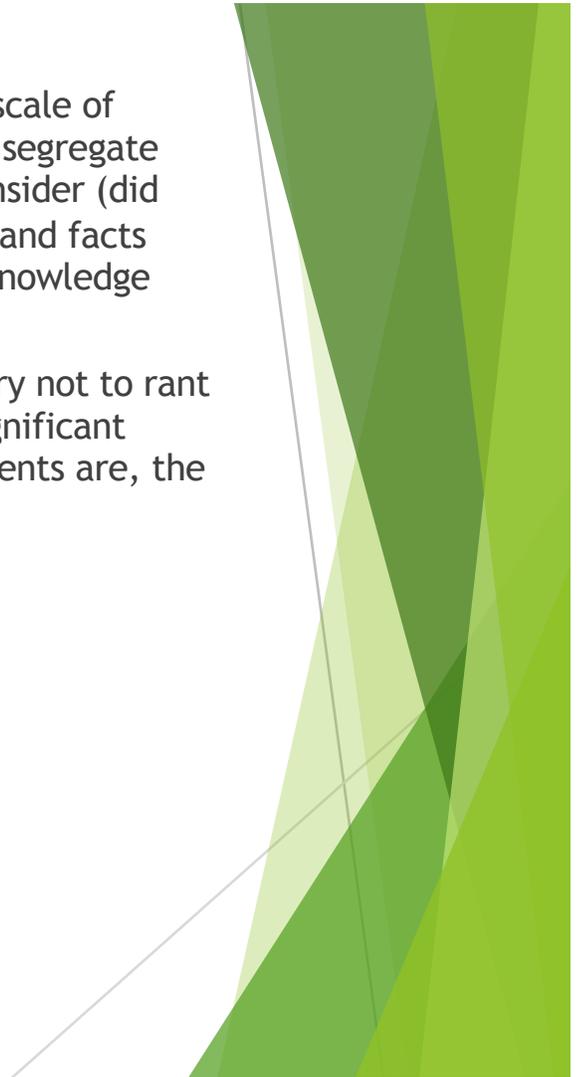


NEPA seems a little confusing and I do not have time to write a detailed comment letter. What should I do?

- ▶ While it is always best to write as detailed and robust comments as you can (the agencies really do read them!), I understand that not everyone has the time and energy to do that.
- ▶ It is still important to participate! Simply write down your main concerns with the project in a formal letter or email and send them to the agency contact person listed in the draft EIS.
 - ▶ Make sure you identify who you are, your interest in the project (i.e. impacted landowner, neighbor, federal permittee, etc), and then clearly and concisely state (or list) your concerns.
 - ▶ Make sure to connect the dots as much as possible. For every statement, make sure you have a "because." ("Siting of the transmission line through my property is going to cause me economic harm because ____")
 - ▶ Make sure you relate your comment back to the EIS. ("The economic harm to my operation was not adequately characterized in the EIS because ____")



- ▶ Some particular areas to watch include the scale of analysis (did they inadequately delineate or segregate local effects), factors that they failed to consider (did they entirely forget to analyze an impact?), and facts that are incorrect (this is where your local knowledge pays off!)
- ▶ While the NEPA process can be frustrating, try not to rant or accuse the agency of anything without significant support. The more professional your comments are, the



THANK YOU!

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